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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JIM BOUTON CORPORATION,

Petitioner,

– against –

WM. WRIGLEY JR. COMPANY and
AMUROL PRODUCTS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 31, 1990

QUESTIONS PRESENTED

1. Unless the Court of Appeals for the Second Circuit explains the reasons why the district court's findings of fact were implausible, is not de novo review of the record by the Second Circuit a reversible error?

2. Does not the decision of the court of appeals conflict directly with the pronouncements of this Court in Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) ("Anderson v. Bessemer City") as to the proper role of an appellate court in applying Fed.R.Civ.P. 52(a) when it reached its own factual conclusions as to the intent of the parties to contract:

a. by placing its own inferences on a document which was contradicted by respondent's own testimony and which was directly contrary to plausible factual findings of the district court?

b. by totally disregarding the

district court's express refusal to credit respondent's testimony and reviewing only the "undisputed objective facts" in the record?

3. Did the court of appeals err when it made its own factual findings as to the issues of partial performance and the sufficiency of the mailgram as a "writing" under New York statutory law?

STATEMENT UNDER RULE 28.1

Pursuant to Rule 28.1 of this Court, petitioner Jim Bouton Corporation states that it has no parent companies, subsidiaries or affiliates.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JIM BOUTON CORPORATION,

Petitioner,

-against-

WM. WRIGLEY JR. COMPANY and AMUROL PRODUCTS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Jim Bouton Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 3, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 902 F.2d 1074 and is set out at pp. 1a-19a of the Appendix. The Findings of Fact and Conclusions of Law of the United District Court for the Southern District of New York, which is not reported, is set out at pp. 20a-96a of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts

> specially and state separately its conclusions of law thereon, ... Findings of fact, ... shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Fed.R.Civ.P. 52(a).

STATEMENT OF THE CASE

This case calls upon the Court to exercise its supervisory power by clearly defining appellate obligations in the review of factual findings subject to the "clearly erroneous" standard. While this Court has from time to time provided guiding principles relating to the application of Rule 52(a) in cases such as Anderson v. Bessemer City, the courts of appeals appear to find no impediment reversing a lower court's factual findings upon a pro forma recitation of the "clearly erroneous" standard. In this case, the Second Circuit has, without any recognition

of its obligation to defer to the credibility and other plausible findings of the trial court, simply made a de novo substitution of its own factual conclusions as to the intent of the parties.

A. The Decision of the District Court

Petitioner Jim Bouton Corporation ("JBC") filed this action in 1985 to enforce an informal modification to a license agreement. A bench trial in the district court (Hon. Peter K. Leisure) commenced on January 25, 1988. The trial lasted five days during which extensive testimony was heard on relevant issues of intent, motivation and the course of dealing of the parties within a period of eight years. The district court also had the benefit of JBC's contemporaneous notes and a substantial record of documentary evidence which were often examined line-by-line by the district court through the testimony of the witnesses.

The district court issued its rulings in a detailed Findings of Fact and Conclusions of Law annotated to the trial record. (20a-96a). The district court found that, notwithstanding the parties' contemplation of more formal papers to be drawn up later by attorneys[1], the parties intended to be bound by an informal agreement, the negotiated terms of which were set forth in a mailgram[2].

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[1] The district court properly applied the New York contract rules approved by the court of appeals. (15a, 71a-72a). In the Second Circuit, "the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event. ... These rules, placing the emphasis on intention rather than form, are sensible and reasonable." Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 261 (2d Cir. 1984), cert. denied, 469 U.S. 828 (1984)(quoting V'Soske v. Barwick, 404 F.2d 495, 499 (2d Cir. 1968), cert. denied, 394 U.S. 921 (1969)).

[2] Amurol first sent telexes but because of transmission problems, also sent a confirmatory mailgram. (48a). The decisions below use the terms "telex" and "mailgram" interchangeably.

Accordingly, the mailgram was found by the district court to have modified an existing license agreement between the parties ("1981 Agreement"). (80a-81a). In arriving at this conclusion, the district court applied a four-factor analysis articulated by the Second Circuit. The following factual findings were made by the district court:

1. There was no explicit statement by either party that it did not intend to be bound until a written, signed agreement was effectuated. (75a-76a).

2. The conduct of the parties, both contemporaneously with the sending of the mailgram and thereafter, indicate an intent to be bound by the terms of the mailgram. (76a-77a).

3. While there were subsequent discussions over one of the terms, the differences between the parties emerged later and such differences were not present

when the parties reached an agreement modifying the license agreement. (77a-78a).

4. The course of dealings between the parties supported the finding that important documents were expected to be in writing but not necessarily formally executed by the parties. The informal agreement memorialized in the mailgram was "in keeping with their customary way of doing business". (78a-80a).

Having concluded that a valid modification was effected at the time the mailgram was sent (the "1984 Agreement"), the district court found the terms of the modification to have been breached by Amurol. Specifically, Amurol breached the 1984 Agreement by failing to pay to Bouton, as agreed by the parties, an additional 2½% royalty after Amurol's reversion to the 1981 Agreement. Amurol also breached the 1984 Agreement by selling GARFIELD STRIPES, KING KONG, GODZILLA and WEREWOLF shredded

gum in a pouch in violation of a covenant not to compete set forth in the mailgram. Accordingly, the district court ordered Amurol to pay damages in the amount of $998,940.34; to pay prejudgment interest on all damages awarded; an accounting of profits of the sale of gums in violation of the covenant not to compete and an injunction for the remainder of the license agreement against the sale of shredded bubble gum in a pouch products in violation of the covenant not to compete. (JA:A 99-100).[3]

B. The Decision of the Court of Appeals

Careful review of the court of appeals' decision will reveal that the expression "definite and firm conviction"

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[3] "JA: ___" as used herein refers to the Joint Appendix filed with the court of appeals. The Joint Appendix was divided into three volumes consisting of the pleadings, signified by an "A__"; the trial transcript, signified by a "T__" and evidence of record, signified by an "E__".

is used by the appellate court as a boilerplate expression to justify a predetermined result. In its decision, the court of appeals found no fault with the district court's application of law to the facts. Yet the court of appeals fails to offer any explanation as to why its view of the facts should be substituted for the view of the district court or why the district court's view is implausible.

In reversing the district court, the court of appeals essentially focused on two writings, the mailgram and a letter written by JBC's counsel. (4a-8a). The court of appeals also selectively and approvingly analyzed the conduct of Amurol and its attorneys after the sending of the mailgram. The court of appeals then concluded:

> Our review of the record, much of which is in the form of written documents, leaves us with the definite and firm conviction that the district court erred in holding otherwise. See

> Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 261 (2d Cir.), cert. denied, 469 U.S. 828 (1984).

(15a)(emphasis added).

The court of appeals did not reveal how the detailed findings of the district court were clearly erroneous. Nor did the court of appeals address the four-factor analysis and ultimate findings of the district court.

The past history of the parties and other evidence which placed the two writings in context for the district court and which formed the basis for the district court's findings relating to the parties course of dealing (see infra, p.7, paragraph 3), were also inexplicably ignored. The court of appeals simply stated:

> Without reiterating the history of the parties' negotiations, we conclude that the undisputed objective facts demonstrate beyond cavil that the parties did not intend to be bound until "final papers" or an "acceptable writing" was prepared and signed.

(17a). Then without any analysis of the facts deemed pertinent by the district court, the court of appeals cited a series of cases which are inapposite to the facts in this case. Also without any recognition of its obligation to accept the district court's factual findings, the court of appeals independently developed its own interpretation of Amurol's part performance and concluded that Amurol's immediate payment of increased royalties was not only referable to the 1984 Agreement but could also be referable to an interim agreement pending the execution of the formal agreement. (18a). This view was rejected by the district court, albeit implicitly (77a, 55a-56a, 90a-93a), and was clearly contradicted by both parties' testimony as well as the objective evidence in the record.

Finally, the court of appeals concluded, also without regard to the

district court's findings, that the mailgram was an insufficient "writing" under the 1981 Agreement[4] and the New York statutory requirement for such modifications to be "in writing and signed by the party against whom enforcement of the change is sought." (15a).

C. **Statement of Facts**

Since 1980 Petitioner Jim Bouton Corporation ("JBC") has licensed to Respondent Amurol Products Company ("Amurol") the right to use the trademark BIG LEAGUE CHEW in connection with a shredded gum in a pouch product. In early 1984 an impasse occurred when JBC refused to consent to Amurol running the same

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[4] Paragraph 29 of the 1981 Agreement requires modifications to be by "an agreement in writing". The district court noted that the 1981 Agreement does not explicitly require the writing to be signed by both parties in order to be valid. (74a-75a). Thus, the district court found the mailgram to be a sufficient writing for the purposes of Paragraph 29.

commercial for the third consecutive year (the "1984 Commercial"). (45a-47a). Since Amurol had committed to the purchase of media time for the 1984 Commercial, JBC's refusal to consent required Amurol to put the media package on hold temporarily. (47a).

The principals for the two parties, Jim Bouton ("Bouton") for JBC and A.G. Atwater ("Atwater") for Amurol, felt a great deal of pressure to resolve the dispute quickly. On the one hand, Atwater was frustrated by the hold up of the media time for the 1984 Commercial. Bouton, on the other hand, feared Atwater's threat of trashing the BIG LEAGUE CHEW brand and thereby depreciating the value of JBC's trademark should the dispute remain unresolved. (JA:T 178, 492-494; E 466-467). After several weeks of debate, the parties reached an agreement on February 22, 1984. (78a). Bouton agreed to relinquish control

over all BIG LEAGUE CHEW advertising and promotions in exchange for an additional 2½% royalty and a covenant from Amurol not to compete in the shredded gum in a pouch market (the "No-compete").[5] (47a-48a).

Atwater who admittedly "had a gun to his head", drafted the terms of the modification with Bouton over the telephone. (52a, 48a). Atwater and Bouton worked on the language together and when the exact language was agreed upon by the parties, a mailgram, signed by Atwater and setting forth the terms, was sent to Bouton and his attorney. (52a, 81a). After Bouton compared the mailgram to his notes and after he determined that the mailgram tracked the language agreed to by the parties over the telephone, Bouton gave Amurol his verbal approval to run the 1984

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[5] Amurol claims that the scope of the No-compete is limited to shredded gum in a pouch with a sports theme, not all shredded gum in a pouch. (Appellant's Brief at 37).

Commercial which had been placed on hold. (48a-51a). Bouton did not wait for his attorney to review the mailgram before giving his approval over the telephone.

Atwater testified that he and Bouton had an understanding at that point. (49a). In response to Atwater's request, Bouton's approval was confirmed in writing by Bouton's attorney in a letter ("Silberman letter"). (53a).

Both the mailgram and the Silberman letter contemplate more formal documents to be drawn in due course. Neither party, whether in writing or otherwise, ever stated to the other that performance or effectiveness of the modification was conditional on the execution of a formal agreement. (55a-56a).[6]

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[6] The district court expressly found that the manner in which the parties performed, relying on a writing but without a formal agreement, was in keeping with their customary way of modifying their agreements in the past. (78a-80a).

Like Bouton, Atwater authorized payment of the additional 2½% royalties without first consulting Amurol's counsel and without waiting for the final papers. (54a). Amurol also stopped seeking Bouton's approval over promotions for the BIG LEAGUE CHEW product. (56a). Bouton believed that the modification was effective immediately. Atwater's testimony, found to be strained and internally inconsistent by the district court, was to the contrary. (49a-52a).

Nine months later and after the 1984 commercial had run its course, Amurol advised JBC that the modification was not effective. Accordingly, Amurol notified JBC that it was "reverting" back to the terms prior to the modification. Having received the benefit of the modifications and no longer faced with "a gun to his head", Atwater now took the position that no modification was effected since no

formal or final agreement memorializing the terms of the modification had been signed by the parties. (52a, 60a-61a).

Amurol's reason for the "reversion" was that its parent, Wm. Wrigley Jr. Company, could not live with the No-compete as drafted in the mailgram. (JA: T 226, E 467). Shortly after Atwater had sent the mailgram, Amurol's counsel reviewed the terms of the modification and determined that there was a possible anti-trust problem. (57a).

In the following months, the parties discussed alternatives which would achieve the intent of a no-compete without triggering anti-trust objections from third parties. Wrigley's anti-trust attorney proposed that Amurol pay JBC a 5% royalty for competing gums as an alternative. (JA: E 98). Bouton did not believe such an alternative would be a sufficient disincentive to Amurol launching a

competitive line of shredded gum in a pouch product toward the close of the license. (57a-60a). The trial court found that the parties could not "reach an agreement on an alternative to the no-compete language" and thereafter, discussions terminated. (61a). This case was commenced by Bouton shortly thereafter.

REASONS FOR GRANT OF THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ENFORCE ADHERENCE TO RULE 52(a) AND TO PROVIDE MINIMUM GUIDELINES WHICH WOULD PREVENT FLAGRANT DEPARTURES FROM THE RULES OF DEFERENCE ARTICULATED BY THIS COURT

As this Court stated in Anderson v. Bessemer City:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

470 U.S. at 573-74.

The district court's decision was overturned by the court of appeals without any discussion of the district court's subsidiary and ultimate findings and without any explanation why the district court's view is not plausible. The court of appeals' decision in this case is an

object lesson in how an appellate court can try a case de novo simply by a mechanistic invocation of the standard of review. Unless this Court further defines an appellate court's obligation to clearly address the findings of fact deemed to be clearly erroneous on appeal and why they are not plausible, Rule 52(a) can easily be rendered meaningless notwithstanding the clear principles enunciated in Anderson v. Bessemer City.

In Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 713 (1986), this Court hinted that such a practice is unacceptable. In reversing and vacating the court of appeals' decision, this Court noted, "nowhere in its opinion did the court ever mention any of the factual findings of the District Court, much less discuss or analyze them." Similarly, in Pullman-Standard v. Swint, 456 U.S. 273, 291-93 (1982), this Court recognized that

the extent of compliance with Rule 52 must be ascertained by examining the actual decision of a court of appeals, not by reliance on a pro forma recitation of the "clearly erroneous" standard.

In its appellee's brief, petitioner JBC duly urged the court of appeals to heed the precepts of this Court announced in Anderson v. Bessemer City. Nonetheless, the appellate court's decision ignores the district court's credibility findings, passes over course-of-dealing evidence found significant by the district court, and arrives at factual conclusions based on inferences it impermissibly draws from the documents that were carefully explained by trial testimony. Implicit in the court of appeals decision is the proposition that little, if any, deference is due the district court's findings when "much of the evidence was in the form of written documents". (15a). This total disregard of

Rule 52(a), especially in light of the 1985 Amendment thereto and this Court's clear pronouncements in Anderson v. Bessemer City, would warrant summary reversal. See Lehman v. Trout, 465 U.S. 1056 (1984); Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809 (1986).

This type of barely disguised de novo review is not an aberration in the Second Circuit. See Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F. 2d 264, 286 (2d Cir. 1986), cert. denied, ___ U.S. ___, 109 S. Ct. 818 (1989)(Kearse, J., dissenting)(The majority "pays little more than lip service" to the principles announced by this Court in Anderson v. Bessemer City and Miller v. Fenton, 474 U.S. 104 (1985)); Williams v. Ward, 845 F. 2d 374, 396 (2d Cir. 1988)(Stewart, J., dissenting)(Since the record is replete with references to the cooperation of other actors in the arraignment system, the

district court's findings may not be summarily dismissed as unrealistic and without factual basis); see also Woodbury v. New York City Transit Authority, 832 F. 2d 764, 772 (2d Cir. 1987)(Feinberg, J., dissenting) (majority should have remanded case for clarification of facts).

In this case, the court of appeals dismissed substantial portions of the record, limiting its analysis to essentially two documents - the mailgram setting forth the new terms agreed upon by the parties and the Silberman letter confirming Bouton's approval of the 1984 Commercial.[7]

A. The Mailgram

In addition to the terms agreed upon by the parties, the mailgram stated, "Will be in touch with Gilson [Amurol's attorney]

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[7] The court of appeals also focused on what it deemed to be "subsequent negotiations" after the sending of the mailgram.

to draw up final papers next week." (4a). In concluding that these words do not reflect an intent on the parties to condition continued performance on the execution of final papers drawn by the attorneys, the district court heard testimony regarding the meaning of this language and made findings of fact regarding the circumstances and motivation surrounding the sending of the mailgram. (46-63a).

The court of appeals, on the other hand, simply cited Webster's Third New International Dictionary and Black's Law Dictionary (4th ed.) for the meaning of "final papers".[8] (5-6a). The court of

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[8] This Court long ago inveighed against the "tyranny of literalness". United States v. Witkovich, 353 U.S. 194, 199 (1957). Learned Hand's admonishment that "[it] is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary," is particularly apt here. Cabell v. Markham, 148 F. 2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404 (1945).

appeals also opined that the parties, being "experienced in the ways of business, simply could not have intended that the cursory mailgram message, which did not even discuss a change in plaintiff's substantial royalties, constituted a legally enforceable modification of the carefully prepared 1981 Agreement". (5a). In reaching this conclusion, the court of appeals never discussed the district court's finding that the use of the informal mailgram to memorialize the new terms was "in keeping with their [Atwater's and Bouton's] customary way of doing business". The court of appeals also ignored the district court's findings relating to the reasons why the parties needed the mailgram in the first place. (41a-47a).

The court of appeals simply developed its own interpretation of the evidence, supplying its own inferences to the

"undisputed objective facts". There is no discussion whatsoever why it deems the district court's view implausible. No guidance is provided as to why the disputed words in the mailgram should be given more weight than the objective evidence which placed the mailgram into the bargaining context for the district court.[9]

B. The Silberman Letter

With regard to the second document critical to the court of appeals' decision, the "Silberman letter", the district court found that the letter was written by Bouton's attorney to confirm that he no

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[9] The court of appeals blindly followed Reprosystem, 727 F.2d 257, without regard to the facts of this case. In contrast to this case, the record in Reprosystem, included relevant documents explicitly stating that "when executed and delivered, this Agreement ... will be valid and binding". 727 F.2d at 262. There was also in the Reprosystem record a press release with language expressly conditioning contractual consummation on the parties entering a definitive agreement acceptable to the parties. 727 F.2d at 262.

longer objected to the commercial "based on the understandings as to modification of the Agreement which is to be reduced to writing in due course." (53a). The district court specifically found that the Silberman letter "spelled out in further detail" the modification set forth in the mailgram. (53a). The Silberman letter also stated, "If your understanding comports with the above, we will operate on the assumption that an acceptable writing will come into being ... ." (7a).

The court of appeals construed the language in the Silberman letter to evidence that no agreement was reached at the time the mailgram was sent.[10] (7a-8a).

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[10] The court of appeals found it significant that the contents of the Silberman letter did not meet with Amurol's approval. (8a). The record belies this assertion. The No-compete, which was not mentioned in the letter, was Amurol's only reason or excuse for not executing a final agreement with JBC. The increase in royalty and other terms detailed in the Silberman letter were never deemed by the

Such an inference is directly contradicted by the partial performance of the parties; by Atwater's own testimony that he and Bouton had reached an understanding at the time of the mailgram; and by Atwater's statement that the telex was sufficient basis for him to produce the commercial without further approval from JBC. (51a).[11]

The court of appeals also construed the Silberman letter, which authorizes Amurol "to run the T.V. ad for 1984",[12] to

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parties to be open issues requiring further negotiation.

[11] Atwater's later testimony claiming there was no agreement until the parties' attorneys reviewed the terms and a final agreement is signed by the parties was expressly found to be not credible by the district court. (50a-51a).

[12] The error of the court of appeals' finding of an interim one year agreement is compounded since the possibility of an interim agreement was never argued by Amurol until the appeal and, in fact, was contradicted by the counterclaim filed by Amurol seeking repayment of the additional 2½% it paid JBC in 1984 on the basis that

support its theory that the parties reached an interim agreement, thereby explaining the immediate payment of the increased royalties by Amurol. (18a). The court of appeals reasoned,

> Because the payment of the royalty is equally, if not more readily, referable to the short term permission to run the specifically named commercial, it cannot be treated as part performance of an agreement covering all commercials during the succeeding four to nine years.

(18a)(emphasis added). It is blatantly clear here that the court of appeals substituted its own less plausible view of Amurol's partial performance.[13]

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no agreement was ever made. (JA: A 47).

[13] As this Court re-emphasized in Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 857 (1982) (quoting United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 495 (1950)), an appellate court cannot substitute its own findings simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent."

Not only did the court of appeals fail to explain why the district court was clearly erroneous on the issue of partial performance[14], but the court of appeals' independent finding of an interim agreement is clearly belied by the record. At trial, Atwater testified that he never intended to make an agreement, whether temporary or final, by sending the mailgram to JBC.

> THE COURT: ... that language of this telex and also the mailgram, did you intend that that should be in full force and effect until an agreement was drawn up satisfactory to the parties?
>
> THE WITNESS: No, your Honor.
>
> THE COURT: What did you intend by doing this?
>
> THE WITNESS: It was an understanding that I would not be bound by this until I had a contract signed.

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[14] Partial performance is an issue for the trier of fact. Garfield v. Paris, 96 U.S. 557, 566 (1878); Christian Dior-New York, Inc. v. Koret, Inc., 792 F.2d 34, 40 (2d Cir. 1986); Snay v. Wood, 374 N.Y.S. 2d 809, 812, 50 A.D.2d 651, 651-52 (N.Y. App.Div. 1975).

> THE COURT: Did you tell Mr. Bouton that you intended not to be bound by this language when you discussed it with him on the telephone?
>
> THE WITNESS: No, I did not.
>
> THE COURT: Why did you think you were going through this exercise if it wasn't something that was ...
>
> THE WITNESS: It was something that I wanted to do.

(JA: T595-6). The aforequoted colloquy demonstrates that at trial the district court had already tested out the appellate court's interim agreement theory. However, Atwater's testimony decisively negated any possibility that the parties performed pursuant to a short term agreement for the year of 1984. In the face of this record, it is the view of the court of appeals below, not the district court's, that is implausible.

C. Section 15-301 of the General Obligations Law of New York

The district court found that the mailgram was a writing sufficient to

satisfy Section 15-301 of the General Obligations Law of New York which provides in pertinent part:

> A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent.

N.Y.Gen.Oblig.L. § 15-301 (McKinney's 1978 & West 1990). While the district court does not detail why it believes the mailgram is a "writing" sufficient to satisfy Section 15-301, the support for the district court's finding can fairly be implied from the district court's detailed Statement of Facts.

Specifically, the district court found that the mailgram set forth all the terms of the modification, either expressly or impliedly, which were discussed by the parties over the telephone. (81a, 48a). The district court also described in detail

how a telex was first sent by Atwater's secretary but because of transmission problems, a confirmatory mailgram was also sent for safe-measure. Finally, the district court noted how Bouton compared the language in the mailgram with the notes he had taken of the agreement reached with Atwater over the telephone. (48a-49a).

Whether the mailgram is a "writing" is a question of fact subject to the "clearly erroneous" standard.[15] In DFI Communications, Inc. v. Greenberg, 41 N.Y. 2d 602, 363 N.E.2d 312, 394 N.Y.S.2d 586 (1977), the New York court of appeals reversed the lower court's decision which had held Board minutes of a corporation not to constitute a "writing" satisfying Section 15-301. The New York court of appeals disagreed with the lower court,

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[15] The court of appeals gave no indication whether it regarded this issue to be a question of fact or law.

distinguishing the Board minutes in issue from the unsigned memorandum rejected in Bakhshandeh v. American Cyanamid Co., 8 N.Y. 2d 981, 169 N.E. 2d 188, 204 N.Y.S. 2d 881 (1960), a case relied upon by the lower court.[16] 41 N.Y. 2d at 606, 363 N.E.2d at 589-90, 394 N.Y.S. 2d at 315.

The New York court of appeals explained that Section 15-301 was to "assure the authenticity of an amendatory agreement; thus, the statute requires a dignity of a formal writing to insure the validity and genuineness of a contractual modification." DFI Communications, 41 N.Y.2d at 606, 363 N.E.2d at 315, 394 N.Y.S. 2d at 589-90. Whether the mailgram in this case measures up to the level of dignity and authenticity of a writing which would insure the validity and genuineness

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[16] Both the DFI Communications and Bakhshandeh cases were cited by the Second Circuit in support of its finding.

of a contractual modification is just the type of issue which should be determined by the "application of the factfinding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case". Commissioner v. Duberstein, 363 U.S. 278, 289 (1960).

In Duberstein this Court determined whether a particular transfer constitutes a "gift" for the purposes of the Internal Revenue Code is a factual inquiry. Whether a mailgram constitutes a "writing" under the circumstances of this case is a similar inquiry of a non-technical nature which has a close relationship to "the data of practical human experience, and the multiplicity of relevant factual elements" which must be determined by the trier of fact. See Duberstein, 363 U.S. at 298.

If the court of appeals in this case believed the district court had failed to make findings of fact essential to a proper

resolution of this issue, the court of appeals should have remanded the case to the district court for further findings. See Icicle Seafoods, 475 U.S. at 714-15. If the court of appeals believed the district court erred, the court of appeals should have explained the standard of review it applied and why the district court was clearly erroneous. The court of appeals failed to do either.

II.

THE DECISION OF THE COURT OF APPEALS IS A REJECTION OF THE GUIDING PRINCIPLES ENUNCIATED BY THIS COURT IN RELATION TO THE PROPER APPLICATION OF RULE 52(a)

The Second Circuit, in reversing the district court's decision, has flouted every principle governing the exercise of the appellate review function.

Determining the weight and credibility of the evidence is the special province of the trier of fact. Inwood

Laboratories v. Ives Laboratories, 456 U.S. at 856. The court of appeals gave no weight to evidence going to the parties' course of dealing and the bargaining context which motivated the parties to set forth the modification in an informal but binding mailgram. In contrast, such evidence of past dealing and motive carried great weight with the district court.[17] It is also apparent, in view of the court of appeals' silence on this issue, that no weight was given to the district court's credibility findings.

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[17] There is no case more appropriate for adherence to a rule giving deference to the trial court's factual findings than one in which there is a vast record of cumulative evidence as to long-past transactions, motives and purposes, the effect of which depends largely on credibility of witnesses. United States v. Oregon State Medical Soc., 343 U.S. 326, 332 (1952). In this case the district court described in detail the previous informal agreements under which the parties operated, the strained relationship of the parties over advertising and other revealing evidence relevant to the issue of intent. (28a-63a).

The Second Circuit has a history of applying a de novo standard of review when factual findings are based on documentary evidence. Anderson v. Bessemer City, 470 U.S. at 574. This Court in Anderson v. Bessemer City and the 1985 Amendment to Rule 52(a) have clearly settled the issue by declaring that inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses. Yet, the court of appeals has impermissibly fallen back on past assumptions in this case by reviewing the documentary evidence de novo.

There is also no question that Rule 52(a) requiring deferential treatment of findings of facts applies equally to factual inferences from "undisputed basic facts". Duberstein, 363 U.S. at 291.

Yet the Second Circuit here has selectively viewed the cold print of the

record to cull its own findings of fact, findings purportedly based on "undisputed objective facts", without any regard to this Court's admonition that "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Anderson v. Bessemer City, 470 U.S. at 573 (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969)).

In applauding Amurol's attorneys who advised Amurol to avoid possible anti-trust problems, the court of appeals appears to have been influenced by its belief that reduction of competition is repugnant to the public interest. (20a) In an exercise of circular reasoning, the court of appeals surmised, "it is logical to expect that experienced businessmen and knowledgeable lawyers will be concerned about entering into a contract that might restrict competition in that field." (20a). The

court of appeals then goes on to approve Amurol's conduct, concluding that Amurol "used good sense in following its attorneys' advice and that nothing in the dealings between the parties hereto prohibited them from doing so." (20a-21a). The question in this case is not whether Amurol's attorneys gave good advice but when, if ever, did the parties intend their modification to come into existence. If the parties had a meeting of the mind at the time the mailgram was sent as the district court found, the concern of Amurol over a purported anti-trust problem raised later is irrelevant to the issue of intent in this case.

Even assuming the motivations ascribed by the court of appeals to Amurol and its attorneys have some slender basis, it is equally permissible to infer from the evidence that the anti-trust issue is a self-serving ploy on the part of Amurol to

further modify terms which Atwater had agreed to improvidently. It is equally permissible to conclude that once Bouton gave his approval to the commercial and Atwater no longer had "a gun to his head", he regretted sending the mailgram setting forth his agreement to the covenant not to compete. Where more than one view is plausible, the court of appeals cannot substitute its own account of the evidence. Anderson v. Bessemer City, 470 U.S. at 574.

In light of the foregoing, the decision of the court of appeals is so out of line with normal and accepted practice that review by this Court is warranted. See Braen v. Pfeifer Oil Trans. Co., 361 U.S. 129, 130 (1959); see also Marshall v. United States, 360 U.S. 310, 313 (1959); Pennsylvania v. Mimms, 434 U.S. 106 (1977).

III.

THE COURT OF APPEALS DECISION HAS AN IMPORTANT AND FAR REACHING IMPACT ON LITIGANTS OVER CONTRACT DISPUTES AND THE JUDICIAL SYSTEM

A. If this Decision is Allowed to Stand, A Proliferation of Appeals Will Be Filed by Dissatisfied Litigants in cases of this Nature

The appellate courts, in their sterile environment sheltered from the realities of the business world, cannot and should not be allowed to impose their own assumptions and theories of business relations by retrying cases of this nature in de novo reviews of the paper record. Litigants must be allowed to have their disputes resolved on a case by case basis, especially is cases such as this when sensitive factual issues of intent, motivation and course of dealing should be given great weight. As this Court recognized in Anderson v. Bessemer City:

> The trial judges's major role is the determination of fact, and with

> experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is a correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

470 U.S. at 574-75.

To permit courts of appeals to share more actively in the fact-finding function would also undermine the legitimacy of the district courts in the eyes of the public. If the court of appeals' decision is allowed to stand, litigants, at least those with resources, will file appeals as a matter of course in the expectation of obtaining a retrial at the appellate level. Inevitably, appeals will multiply in contract cases of this type and judicial resources will be needlessly wasted.

B. If This Decision Is Allowed To Stand, The Manner In Which Businessmen Do Business Would Be Impermissibly Dictated By The Presumptions Of The Courts

Businessmen make binding informal agreements every day in New York and all over the United States. With the proliferation of facsimile machines and telexes in modern offices, businessmen also conduct business by informal letters and documents. The Second Circuit has, through a series of decisions culminating in this case[18], developed a strong judicial presumption against informal agreements when more formal agreements appear to be contemplated. Unless this Court

[18] During the Appeal, Amurol asserted, "what has been consistent in the Second Circuit is that this Court has determined that the parties did not in fact intend to be bound, despite contrary findings by trial courts and juries." (Reply Brief at 6). While the Second Circuit cases relied upon by Amurol can all be easily distinguished, Amurol and others like Amurol will be encouraged to reargue the intent to contract issues on appeal.

intervenes, the Second Circuit can be expected to make assumptions about the "experienced businessman" or "logical businessman" grounded upon broad preconceptions about business practices by interpreting the businessmen's actions de novo. See, e.g., R.G. Group, Inc. v. Horn & Hardart Co., 751 F. 2d 69, 77 (2d Cir. 1984)("Certainly this is the kind of agreement where it would be unusual to rely on an oral understanding."); Winston v. Mediafare Entertainment Corp., 777 F. 2d 78, 83 (2d Cir. 1985)(The Court noted that $62,500 at issue was not a trifling amount and where "the purpose of the agreement is to forestall litigation, prudence strongly suggests that their agreement be written ...").

The unfortunate businessman who still believes in doing business on good faith and, by informally documenting such agreements with familiar business partners,

must now hire attorneys to insure that the appropriate language is drafted to legally and clearly express the intent of the parties.

When disputes arise, the unwary businessman who does not do business with his attorney at his side will be unable to rely on the courts to discern the true intent and motivation of his actions. Businessmen will simply have to wait for the attorneys to draft and redraft agreements or proceed at their own risk. The unscrupulous will be able to employ ambiguous language in informal documents to gain immediate benefits well knowing that the Second Circuit will value form over substance, elevating contract formalism over the intent or good faith of the parties. Unless a clear message admonishing the Second Circuit from such unacceptable exercises of their appellate power is provided by this Court, the

judicial process, at least for some, will create an intolerable burden.

CONCLUSION

If the Second Court decision is allowed to stand, manifest injustice would be imposed upon petitioner and an impermissible departure from the accepted course of judicial proceedings would be condoned. The precedent of this case, if permitted to stand, will encourage litigants to seek de novo review from the courts of appeals. Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 560—August Term, 1989

(Argued January 10, 1990 Decided May 3, 1990)

Docket No. 89-7805

JIM BOUTON CORPORATION,
a New Jersey Corporation,

Plaintiff-Appellee,

—v.—

WM. WRIGLEY JR. COMPANY, a Delaware Corporation, and AMUROL PRODUCTS COMPANY, an Illinois Corporation, and subsidiary of Wm. Wrigley Jr. Company,

Defendants,

AMUROL PRODUCTS COMPANY,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, CARDAMONE and ALTIMARI,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York which followed a nonjury trial before Judge Leisure. The portion of the judgment that awarded damages and granted injunctive relief to appellee is reversed. The portion of the judgment that dismissed appellant's counterclaim and the claims asserted in Counts II and III of appellee's amended complaint are affirmed.

STEVEN B. POKOTILOW, New York, New York (Blum Kaplan, Anita K. Yeung, New York, New York, of counsel), *for Plaintiff-Appellee.*

JOHN G. KOELTL, New York, New York (Jonathan H. Hines, Colby A. Smith, Debevoise & Plimpton, New York, New York, of counsel), *for Defendant-Appellant.*

VAN GRAAFEILAND, *Circuit Judge*:

Amurol Products Company appeals from a judgment of the United States District Court for the Southern District of New York which followed a nonjury trial before Judge Leisure. The judgment awarded Jim Bouton Corporation (JBC) substantial damages and gave it injunctive relief in its action for breach of contract. It also dismissed Amurol's counterclaim seeking recovery against JBC on a theory of unjust enrichment. We

reverse those portions of the judgment that awarded damages and granted injunctive relief to JBC. We affirm the dismissal of Amurol's counterclaim. We also affirm the dismissal of the causes of action asserted in Counts II and III of JBC's amended complaint.

Jim Bouton, a former major league baseball player, is president and 50 percent shareholder of JBC. The only other shareholder is Rob Nelson, a former teammate of Bouton. Amurol, a wholly-owned subsidiary of Wm. Wrigley, Jr. Company, which was relieved of liability by the district court, is engaged in the manufacture of candy, gum, and other food products. Bouton and Nelson formed JBC in 1979 to capitalize on their idea of marketing bubble gum that resembles chewing tobacco. In 1979, Bouton filed a trademark application for "BIG LEAGUE CHEW," shredded bubble gum packaged in a pouch. JBC's agent contacted Amurol about marketing the product. Amurol already had developed the concept of shredded bubble gum, but expressed interest in using the BIG LEAGUE CHEW trademark. The parties entered into a series of licensing agreements which culminated in a formal agreement signed in June 1982, but effective as of July 1981 (the 1981 agreement).

Under the agreement, JBC was to receive royalties on Amurol's sale of BIG LEAGUE CHEW. The royalties were calculated on a sliding scale, 2.5 percent for the first $20 million in sales, 3.5 percent on the second $20 million, and 5 percent on sales over $40 million. JBC retained the right to approve all advertising. Finally, the document provided that it was the entire understanding between the parties and could not be modified except in writing.

Bouton, as president of JBC, frequently objected to proposed advertising. However, because Amurol sometimes did not consult Bouton until substantial time and money had been invested in a particular advertising program, on at least two occasions Bouton consented to advertising he did not like, reserving the right to exercise disapproval during the ensuing season. In 1984, a dispute arose over a promotional campaign based on a "Baseball Bonanza" giveaway game. Amurol organized the campaign, announced its use to its brokers, and purchased media time for commercials, but Bouton refused to consent to the format. A.G. Atwater, an Amurol executive, contacted Bouton by telephone on February 22, 1984, to try to obtain his consent. After some discussion, they orally agreed that JBC would relinquish advertising approval rights in return for a flat 5 percent royalty on all sales of BIG LEAGUE CHEW. Atwater further agreed orally that Amurol would refrain from marketing any other shredded bubble gum that would compete with BIG LEAGUE CHEW, but that Amurol could continue to sell two products, "BUCKAROO CHEW" and "POPEYE", which already were on the market. Bouton then gave his approval to run the Baseball Bonanza advertising campaign.

Following this oral conversation, Atwater sent Bouton a mailgram dated February 22, 1984, which read as follows:

> This is the text we talked about. Will be in touch with Gilson to draw up final papers next week.
>
> If Amurol Products Company elects to continue advertising, it will create and run advertising for BIG LEAGUE CHEW with a masculine sports

theme featuring the brand in a quote macho unquote image.

If promotional advertising is run, it will make every attempt to feature the brand in the same image.

Any promotions to the consumer will continue to feature prizes which are sports-oriented and in keeping with the image of the brand.

Amurol, in consideration of Jim Bouton Corporation relinquishing all approval of advertising and promotions, will, during the life of the contract, refrain from introducing another quote shredded unquote bubble gum which would compete with BIG LEAGUE CHEW. POPEYE and BUCKAROO CHEW, already on the market can continue to be produced and sold.

JBC's contention, as set forth in the Amended Pre Trial Order, is that it entered into a "valid binding and enforceable agreement" with Amurol on February 22, 1984, the terms and conditions of which were "set forth, memorialized, and incorporated" in the February 22 mailgram. Although the district court's opinion is somewhat obscure on this point, a fair reading of it indicates that the district court agreed. We disagree..

The 1981 agreement, in which millions of dollars were at stake, contains thirty-three paragraphs and takes up seventeen pages of the printed appendix on appeal. The parties, experienced in the ways of business, simply could not have intended that the cursory mailgram message, which did not even discuss a change in plaintiff's substantial royalties, constituted a legally enforceable modification of the carefully prepared 1981 contract. The mailgram's reference to the drawing up of "final

papers" by Amurol's lawyer evidences a clear intent to the contrary. The word "final" has the commonly understood lay meaning of "conclusive," "decisive," or "definitive." *Webster's Third New International Dictionary* 851. In legal parlance, its meaning is substantially the same. *See People v. Gaggi*, 104 A.D.2d 422, 424 (1984) (mem.); *Standard Oil Co. v. United States*, 10 F. Supp. 550, 560 (Ct. Cl. 1935); *Black's Law Dictionary*, 757 4th ed.

The conduct of the parties which followed the dispatch of the mailgram demonstrates that they recognized the need for a conclusive, decisive and definitive document prepared by, or under the supervision of, their lawyers. At Bouton's request, a copy of the mailgram was sent directly to James Silberman, JBC's lawyer, and Silberman was JBC's spokesman in most of the negotiations that followed. Silberman promptly questioned the absence of any provision in the mailgram for increased royalties and also informed Atwater that JBC wanted to retain the right to restrict the use of the package in connection with the sale of other products and to approve package graphics. Moreover, although in the final paragraph of the mailgram JBC is said to have relinquished all right to approve advertising and promotions "during the life of the contract", Atwater believed it necessary to obtain a letter from Silberman specifically approving the Baseball Bonanza commercial. On February 28, 1984, Silberman sent Atwater a letter reading as follows:

> You have requested written confirmation that Amurol can use for 1984 the TV advertisement previously submitted to Jim Bouton based on the understandings as to modification of the Agreement which is to be reduced to writing in due course.

Part of the understanding is set forth in your Mailgram of February 22, 1984. The understanding is also based on the following conditions:

1. Relinquishment of approval of advertising and promotion covers all "Articles" (BIG LEAGUE CHEW shredded bubble gum and BIG LEAGUE PLUG candy).

2. On all sales of "Articles" for the period January 1, 1984 through the end of the Agreement, the payment under paragraph 4 will be five percent (5%) on Net Sales.

3. Relinquishment of approval of advertising and promotion shall not be construed as a relinquishment of any other rights that JBC has under the Agreement including:

(a) the right to prohibit use of the package (exterior or within the pouch) to sell another product without a separate agreement; and

(b) the right to approve package graphics.

If your understanding comports with the above, we will operate on the assumption that an acceptable writing will come into being and, on behalf of The Jim Bouton Corporation, I hereby give Amurol authorization to run the TV ad for 1984.

JBC's contention, as set forth in the Amended Pre Trial Order, is that the foregoing letter "reiterated and clarified" the terms of the mailgram and incorporated "related conditions" that were "implied" in the mailgram. This simply is not so. Silberman's letter recognized that only "[p]art of the understanding" was contained in the mailgram. In addition to the royalty

provisions, which were not referred to at all in the mailgram, Silberman's letter proposed that JBC would retain the right to restrict the use of the gum packages and their graphics or appearance, two additional matters concerning which the mailgram was completely silent. Moreover, the authorization given for the Baseball Bonanza commercial was only for the year 1984, not for the "life of the contract," thus indicating that JBC was acting under the assumption that it had not relinquished its right to reject other advertisements or this one in the years following 1984. Lastly, and most importantly, an "acceptable writing" between the parties was not to come into being unless the contents of the letter met with Amurol's approval. Significantly, the contents did not meet with Amurol's approval. *See Willmott v. Giarraputo*, 5 N.Y.2d 250, 253 (1959). As summarized below, the parties negotiated for nine months in an unsuccessful effort to arrive at an "acceptable writing."

When Amurol's attorney, Jerome Gilson, reviewed the mailgram and Silberman's letter, he immediately questioned the legality under the antitrust laws of Amurol's proposed covenant not to compete. On March 19, 1984, Gilson orally conveyed his misgivings to Silberman, and Silberman promised to prepare a draft letter incorporating the terms of the supplemental agreement. On April 17, 1984, and again on May 18, 1984, Gilson wrote to Silberman inquiring about the promised draft. On June 8, 1984, Silberman sent Gilson the draft of a proposed "Amendment to Agreement."

Although the "Whereas" clauses of a contract do not determine its operative effect, they do furnish a background in relation to which the meaning and intent of the operative provisions can be determined. The

"Whereas" clauses of Attorney Silberman's draft are illuminating. The first clause states that JBC and Amurol are parties to the 1981 agreement (not a February 1984 agreement). The second states that the parties "desire to amend" the 1981 agreement (not that they already have amended it). Despite the objection that Gilson already had voiced to the anticompetitive clause, Silberman included a provision in his draft to the effect that Amurol would not introduce and market in the United States and Canada "a shredded bubble gum which will compete with the BIG LEAGUE CHEW Brand," excepting from the anticompetitive clause only the POPEYE and BUCKAROO CHEW brands that Amurol already was marketing.

JBC's desire to eliminate competition proved to be a stumbling block throughout the entire nine months of negotiation. On June 19, 1984, after Attorney Gilson had had an opportunity to review Attorney Silberman's draft, he made several adverse comments about it in a letter to Atwater. Referring to the anticompetitive clause he said:

> As I mentioned to you previously, that for antitrust reasons, I am uncomfortable with a no-compete clause of this type. I tried to talk Silberman out of it several months ago, but he either forgot or is unwilling to concede. As I see it, we have two choices: delete it or ask Gordon Lang for an antitrust opinion. If he approves it, I have no problem with it. Shall I give him a call? If it stays in, the rest of the paragraph, which allows shredded gum to be sold outside the U.S., looks acceptable.

Referring to the clause which prohibited Amurol from using the interior or exterior of the package or container to sell other products without a separate agreement with JBC, Gilson said:

> This was mentioned in his letter of February 28, 1984, but not in your telex of February 22, 1984. This is another form of no-compete clause which sounds very risky, as though JBC owned a patent on the pouch *and* the display container. Thus, until probably 1993 you would have to pay tribute to JBC if you wanted to sell another pouch product (interior or exterior) or use the retail display container for another novelty item. This seems very harsh to me, although I do not see a serious antitrust problem. Should we discuss it?

With Atwater's approval, Gilson then sought advice from Attorney Gordon Lang, a specialist in the field of antitrust. The letter read in pertinent part as follows:

> You will recall we talked last week about the no-compete clause being requested of Amurol in a trademark license amendment. Since then I tracked down Jim Silberman, attorney for Bouton, and unsuccessfully attempted to persuade him to drop this demand. He contended that it was an important point. Accordingly, the question is ripe for your advice.
>
> * * *
>
> What do you think about its legality? A.G. wants to wrap up the amendment promptly. Could you get back to me in a few days?

On August 14, 1984, Attorney Lang responded to Gilson's request in part as follows:

> Particular caution should be exercised in the case of Amurol since it is owned by Wrigley, the dominant manufacturer of chewing gum in the United States. The restriction on marketing other types of shredded bubble gum could be made the object of antitrust attack because it may foreclose marketing opportunities to other persons who might wish to sell their ideas for the manufacture or marketing of shredded bubble gum to Amurol or Wrigley, thereby constituting a substantial restraint of trade under § 1 of the Sherman Act, 15 U.S.C. § 1 (1982). There are numerous cases in the ordinary distribution context which hold that foreclosure of even 15-25 percent of the total number of distribution outlets constitutes an illegal restraint of trade. [citations omitted]. Wrigley's share of the chewing gum market is considerably higher than the 15-25 percent threshold, and its share of the shredded bubble gum market is even higher yet. To the mischievous antitrust treble damage plaintiff, this combination of facts and circumstances presents an opportunity for costly and time-consuming litigation against Amurol, Wrigley and JBC. For these reasons, it is advised that the proposed restriction be eliminated from the draft amendment to the Agreement between JBC and Amurol.

Mr. Lang continued:

> In the event that JBC wishes to share in the profits derived from the sale of types of shredded bubble gum other than BIG LEAGUE CHEW, this could well be done by offering JBC a royalty from

the sales of all kinds of shredded bubble gum marketed by Amurol in return for JBC having provided Amurol with valuable and constructive ideas, know-how and advice related to the development, manufacture and marketing of shredded bubble gum. This would constitute a form of compensation for the original contribution that JBC made to the shredded bubble gum product which Amurol developed with the close cooperation and assistance of JBC.

On August 20, 1984, Gilson wrote to Silberman, reminding him of the fact that in addition to the 1981 agreement with respect to the BIG LEAGUE CHEW and BIG LEAGUE PLUG (candy) trademarks, there was an entirely separate agreement covering the trademark "BUCKAROO CHEW" [dated November 11, 1980] due to expire on September 15, 1984. He suggested that the two agreements be consolidated and enclosed a proposed draft to that effect. With respect to Silberman's proposed anticompetitive clause he wrote:

> We have consulted with Amurol's outside antitrust counsel with respect to the following language contained in the agreement you drafted:
>
> > During the Term of this Agreement, the Company will not introduce and market in the Territory a shredded bubble gum which will compete with the BIG LEAGUE CHEW Brand.
>
> Our client is unable to agree to this provision as drafted. As an alternative, AG has agreed that Amurol will pay to Bouton 5% royalties on any competitive shredded bubble gum product that Amurol should sell, in payment for the services ren-

dered by Mr. Bouton in the initial stages of development of the shredded bubble gum product. I believe this provision will avoid the potential for an antitrust challenge to the non-compete clause you originally drafted. Thus, we have included such a provision in the proposed Amendment.

Please review this Amendment with Mr. Bouton and let us have your comments as soon as possible. In light of the expiration of the BUCKAROO CHEW agreement on September 15, 1984, we would certainly like to finalize this matter at the earliest opportunity.

The amendment as proposed by Gilson read as follows:

Subject only to the provisions of paragraph 8 of the BIG LEAGUE CHEW Agreement, JBC acknowledges that the Company has the right to market outside of the Territory without obligation to JBC Articles which do not utilize trademarks, themes and Property covered by the Agreements, and that the Company is the owner of all right, title and interest in and to the formula, know-how and trade secrets embodied in or related to shredded bubble gum. However, in recognition of and as payment for JBC's participation in and services rendered in connection with the initial development of the shredded bubble gum product, as to any new shredded bubble gum products introduced and marketed by the Company in the Territory, the Company agrees to pay to JBC five percent (5%) on Net Sales without regard to the volume of Net Sales in a calendar year.

Silberman then countered with the proposal that if Amurol marketed any other shredded bubble gum products, it would pay 5 percent royalties to JBC and that any trademarks used by Amurol in connection with these other shredded bubble gum products would be owned by JBC upon termination of the agreement. On this proverbial rock, the ship of compromise foundered. In a letter to Silberman from Susan Neal, one of Gilson's partners, Mr. Atwater's reaction to Silberman's proposal was summarized as follows:

> Following our telephone conversation of October 1, 1984, I had an opportunity to discuss your most recent proposals with Mr. Atwater. As I was unable to reach you by phone, I am taking this opportunity to advise you as to Mr. Atwater's reaction.
>
> Amurol is not opposed to entering into a separate agreement which provides for payment of 5% of net sales on future shredded bubble gum products. However, Mr. Atwater indicated that Amurol would "absolutely not" agree to Bouton's ownership of any trademarks used in connection with such products upon termination of the agreement. Aside from this one provision, however, I believe the principals are in agreement and we should be able to finalize this matter prior to the current expiration date of November 1, 1984.
>
> Please let me hear from you at your earliest convenience.

On November 26, 1984, recognizing that "Amurol and Jim Bouton have been unable to reach an agreement as to a modification of the 1981 BIG LEAGUE

CHEW agreement," Gilson terminated further discussions concerning a proposed modification.

We are satisfied that both sides negotiated in good faith for a written amendment of the 1981 contract, and we can see no purpose or intent in those lengthy negotiations if a binding amendment already had been agreed upon. Our review of the record, much of which is in the form of written documents, leaves us with the definite and firm conviction that the district court erred in holding otherwise. *See Reprosytem, B.V. v. SCM Corp.*, 727 F.2d 257, 261 (2d Cir.), *cert. denied*, 469 U.S. 828 (1984).

The 1981 agreement provided that its terms could not be waived or modified "except by an agreement in writing." Recognizing that the mailgram did not contain all the necessary material terms, JBC contends that the mailgram and Silberman's letter of February 28, 1984 "together" constitute such an agreement. The fallacy in this argument is that the February 28 letter was not an agreement, but was instead a counterproposal that never was agreed to. As the mailgram anticipated the preparation by Amurol's attorney of "final papers", Silberman's letter contemplated the future preparation of an "acceptable writing." The above detailed recitation of facts discloses that a writing acceptable to both parties never was prepared. This being so, the 1981 contract's requirement of an "agreement in writing" and New York's statutory requirement of an agreement "in writing and signed by the party against whom enforcement of the change is sought" (General Obligations Law § 15-301(1)) have not been met. *See DFI Communications, Inc. v. Greenberg*, 51 A.D.2d 403 (1976), *modified*, 41 N.Y.2d 602 (1977), (Court of Appeals agreed with

Appellate Division that a note or memorandum of an agreement is insufficient to satisfy the requirements of section 15-301, but held that corporate minutes containing the "complete amendatory agreement" and signed by the secretary of the company against whom enforcement of the change was sought met the statute's requirements); *Bakhshandeh v. American Cyanamid Co.*, 8 A.D.2d 35, 37 (1959), *aff'd*, 8 N.Y.2d 981 (1960) (mem.); *Elmsford Sheet Metal Workers, Inc. v. Shasta Indus., Inc.*, 103 A.D.2d 764 (1984) (mem.).

Applying general principles of contract law, we arrive at the same result, viz., that there was no binding contract of amendment. As the Supreme Court observed in *United States v. Line Material Co.*, 333 U.S. 287 (1948), "[p]ublic policy has condemned monopolies for centuries." *Id.* at 308. That feeling exists in large measure to this day. "Since competition is generally held to benefit the public, any reduction in competition must be considered against the public interest." *Dellwood Foods, Inc. v. Kraftco Corp.*, 420 F. Supp. 424, 428 (S.D.N.Y. 1976). Where, as here, a corporation and its parent company occupy a dominant position in a commercial field, it is logical to expect that experienced businessmen and knowledgeable lawyers will be concerned about entering into a contract that might restrict competition in that field. It is not at all surprising that Amurol's antitrust counsel recommended that Amurol refrain from becoming a party to such a contract.

Troubled by cases such as *Dictograph Products, Inc. v. Federal Trade Commission*, 217 F.2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955), counsel opined that even if a "mischievous antitrust treble damage plaintiff" could not be assured of success, the combina-

tion of circumstances "presents an opportunity for costly and time-consuming litigation . . . ." Without assuming to decide whether a suit by such a plaintiff against the parties herein would be successful, we are satisfied that Amurol's attorneys used good legal judgment in advising Amurol to avoid the problem. We also are satisfied that Amurol used good sense in following its attorneys' advice and that nothing in the dealings between the parties hereto prohibited them from so doing.

New York follows the generally accepted rule that when parties negotiating a proposed contract express an intent not to be bound until their negotiations have culminated in the execution of a formal contract, they cannot be held bound until that event has occurred. *See R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 74 (2d Cir. 1984); *Scheck v. Francis*, 26 N.Y.2d 466, 469-70 (1970); *Brause v. Goldman*, 10 A.D.2d 328, 332 (1960), *aff'd sub nom. Brause v. Marshall*, 9 N.Y.2d 620 (1961) (mem.).

Without reiterating the history of the parties' negotiations, we conclude that the undisputed objective facts demonstrate beyond cavil that the parties did not intend to be bound until "final papers" or an "acceptable writing" was prepared and signed. *See Feick v. Fleener*, 653 F.2d 69, 74 (2d Cir. 1981) ("Events are moving very rapidly and it will be to the family's advantage if we can formalize our understanding as soon as possible."); *Tebbutt v. Niagara Mohawk Power Corp.*, 124 A.D.2d 266, 268 (1986) (mem.) ("Please advise whether the foregoing terms are satisfactory to your clients and we can proceed to prepare whatever contract documents may be required."); *Rosenzweig v. Salkind*, 5 A.D.2d

58, 60 (1957), *aff'd*, 5 N.Y.2d 902 (1959) (mem.) ("Will you please go over same, and if it is satisfactory, advise me, and I will have them executed, and arrange to meet with you within the next day or two for the purpose of concluding this matter."); *ABC Trading Co. v. Westinghouse Electric Supply Co.*, 382 F. Supp. 600, 602 (E.D.N.Y. 1974) ("If your client finds this proposal agreeable in principle, we can proceed to reduce it to a written agreement . . . ."). *See also EDP Medical Computer Systems, Inc. v. Sears, Roebuck & Co.*, 149 A.D.2d 563, 564-65 (mem.), *appeal dismissed*, 74 N.Y.2d 873 (1989); *Gambee v. Argendorf*, 10 Misc. 2d 598, 600, 602 (1958).

Shortly after Attorney Silberman sent his letter of February 22, 1984, in which he gave Amurol authorization to run the Baseball Bonanza advertisement "for 1984", he contacted Atwater and inquired, "Since we sent you a letter and you are going ahead with the commercial, would you pay an additional 2-1/2 percent?" Amurol complied with this request. JBC contends that this was convincing evidence that the parties had agreed upon all the material terms of an amended contract running to 1988 with an option for a five-year renewal term. Because the payment of the increased royalty is equally, if not more readily, referable to the short term permission to run the specifically named commercial, it cannot be treated as part performance of an agreement covering all commercials during the succeeding four to nine years. *See Wilson v. La Van*, 22 N.Y.2d 131, 134-35 (1968); *Bakhshandeh v. American Cyanamid Co.*, *supra*, 8 A.D.2d at 38; *Bright Radio Laboratories, Inc. v. Coastal Commercial Corp.*, 4 A.D.2d 491, 494 (1957), *aff'd*, 4 N.Y.2d 1021 (1958) (mem.).

By the same token, we agree with the district court that Amurol was not entitled to the return of the additional 2 1/2 percent royalty when it terminated the negotiations looking toward an amended contract. Since it had the use of the Baseball Bonanza commercial, there was no unjust enrichment here.

We hold also, for the reasons stated by the district court, that JBC's alternate claims in Counts II and III of its amended complaint that Amurol breached the unamended 1981 contract were properly dismissed. Because we hold that JBC is not entitled to any recovery, we do not reach the question whether the district court used the proper measure of damages.

In sum, we reverse the portion of the district court's judgment which holds that JBC and Amurol entered into a binding contract modifying their 1981 agreement and awards damages and grants an injunction based on the district court's modification holding; we affirm the portion of the district court's judgment that denies Amurol recovery on its counterclaim, and we affirm the portion that dismisses the claims asserted in Counts II and III of JBC's amended complaint. No costs to either party.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JIM BOUTON CORPORATION,	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
-against-	:	
WM. WRIGLEY JR. COMPANY and AMUROL PRODUCTS COMPANY,	:	85 CIV. 2308 (PKL)
Defendants.	:	

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LEISURE, District Judge:

On January 25, 26, 27, 28 and 29, 1988, this case was tried to the Court without a jury. The parties submitted posttrial proposed findings of fact and conclusions of law on March 3, 1988, and thereafter submitted simultaneous reply papers. Plaintiff subsequently moved to reopen the testimony to offer additional evidence. For the reasons stated below, the Court dismisses the action as to defendant Wm. Wrigley Jr. Company, finds for plaintiff on its first claim for relief, for defendant Amurol on plaintiff's second and third claims for relief, and for plaintiff on defendant Amurol's counterclaim. The Court also denies plaintiff's motion to reopen the testimony on the present record as set forth below. The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules

of Civil Procedure.

FINDINGS OF FACT

THE PARTIES

Plaintiff Jim Bouton Corporation ("JBC") is a corporation organized and existing under the laws of the State of New Jersey. The president of the corporation is Jim Bouton ("Bouton"), a former major league baseball player. The only other shareholder in the corporation is Rob Nelson ("Nelson"). The corporation was formed in 1979, with Bouton as president and Nelson as vice-president. Each then owned and continues to own 50% of the corporation.

Bouton is a well-known sports figure and entertainment personality. He played professional baseball in the minor leagues for three years, and then was a pitcher for the New York Yankees beginning in 1962. He was subsequently sold to the Seattle Pilots, and then traded to the Houston

Astros. In 1970, he retired from baseball. Also in 1970, Bouton wrote the book Ball Four, which was on the best-seller list for seventeen weeks, and sold over 250,000 copies, and about three million copies in paperback.

After his retirement from baseball, he joined local network television station WABC in New York as a sportscaster on the 6:00 and 11:00 o'clock evening news. In 1973, he joined WCBS in New York as a television sportscaster, where he remained until 1976. In 1976, Bouton also created, wrote and acted in a situation comedy that aired on the CBS network in the fall of 1976. The show ran five weeks before it was canceled.

In 1977, Bouton began a comeback to the major leagues. He played in the minor leagues in Knoxville, Tennessee, Durango, Mexico and Portland, Oregon. In 1978, he played in the Atlanta Braves' organization

in Savannah, Georgia. At the end of the 1978 season, he was called up to the Atlanta Braves. His return to the major leagues was short-lived. In 1979, after retiring from professional baseball permanently, Bouton formed JBC. Bouton is also engaged in other endeavors, and in 1983 he formed a company called Big League Cards, which makes personalized baseball cards. Bouton also engages in after dinner and motivational speech-making.

Wm. Wrigley Jr. Company ("Wrigley") is a Delaware corporation having its principal place of business in Chicago, Illinois. Wrigley is a leading manufacturer and distributor of chewing gum and related goods.

Amurol Products Company ("Amurol") is an Illinois corporation with its principal place of business in Naperville, Illinois. Amurol is a wholly-owned subsidiary of Wrigley. Amurol is engaged in the

manufacture, sale and distribution of candy, gum, dietetic food products and novelty products.

DEVELOPMENT OF THE PRODUCT

In 1977, while playing for the Portland, Oregon minor league baseball team, Bouton and Nelson came up with the concept that developed into the product which is the subject of this suit. One day, while Bouton was in the bullpen with Nelson, the team's pitching coach, they observed that all the other players and coaches on the team were chewing tobacco. The players did not particularly like the taste of chewing tobacco, and it made many of them sick, particularly when used over sustained periods of time, but many thought that it contributed to their maintaining "macho" images. It was then that Nelson commented that it was unfortunate that there was not something available that looked like tobacco but was goodtasting,

such as gum. Bouton and Nelson laughed at the idea, and did not think any more about it at that time.

Several months later, after the season had ended, Bouton could not get the idea out of his head. He contacted Nelson and suggested that the concept might be a commercial success, and that they should try to produce and market the gum. Nelson made some gum in his kitchen, colored and flavored it with molasses, and cut it into strips with a large knife. Nelson and Bouton then contacted an advertising agency in Portland, and, with the help of the agency, developed a package design for the pouch in which the gum would be sold. Bouton and Nelson contacted an attorney in Portland to advise them about selling the product and filing for trademark application.

In 1978, Bouton contacted U.S. Licensing, a professional licensing

organization, and Vincent Alati ("Alati"), President of U.S. Licensing, to license the concept of BIG LEAGUE CHEW shredded gum in a pouch. On June 15, 1979, Bouton filed an application for a trademark for BIG LEAGUE CHEW. In the meantime, U.S. Licensing contacted various gum manufacturers to see if there was any interest in manufacturing and marketing BIG LEAGUE CHEW. In November of 1979, Bouton entered into a contract with U.S. Licensing. Under that contract, Bouton was obligated to pay U.S. Licensing 35% of all royalties earned by Bouton from any license agreement for BIG LEAGUE CHEW.

In the middle of 1979, Alati contacted Amurol to determine if it would be interested in entering into a license agreement. Alati conducted negotiations on behalf of Bouton with Amurol's then vice-president and current president and chief executive officer, A.G. Atwater ("Atwater"). At the beginning of the

negotiations, Amurol and Bouton exchanged product disclosure forms and other written documents.

Prior to being contacted by Alati, Amurol had dealt with the Conwood Corporation, a manufacturer of chewing tobacco, about selling shredded gum in a pouch. Accordingly, Amurol informed Alati that although it did not wish to use Bouton's concept of shredded gum because it already had the idea, it did wish to use the trademarked name BIG LEAGUE CHEW.

EARLY CONTRACTUAL RELATIONS

After further negotiations between the parties, attorneys representing U.S. Licensing prepared a licensing contract covering the BIG LEAGUE CHEW mark. The agreement ("The Original Agreement"), Defendants' Trial Exhibit QQQQQ[1] was

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[1] Hereinafter, Defendants' Trial Exhibits will be abbreviated DTX ___, and Plaintiff's Trial Exhibits PTX ___.

executed on or about December 5, 1979. The Original Agreement was for a term of three years from initial market entry of the product. Bouton was to receive a 2½% royalty on gross sales, as well as power to approve art work, packaging and related advertising material. The Original Agreement also gave Amurol the right to market another shredded gum product with a Western theme rather than a baseball theme. The Original Agreement further provided that it set forth the entire understanding of the parties and that it could not be modified except in writing.

In the first half of 1980, Amurol developed the packaging and graphics, with Bouton's approval, and conducted market testing. In the middle of 1980, Amurol proceeded to introduce the product. BIG LEAGUE CHEW was an immediate success and became Amurol's best-selling product. In its first six months on the market, without

any advertising or promotion, sales of BIG LEAGUE CHEW totaled $3.4 million.

In the meantime, however, problems between the parties surfaced. Bouton's application for a trademark for BIG LEAGUE CHEW was rejected by the patent and trademark office in May of 1980. It was then arranged for Amurol's outside counsel, Jerome Gilson, Esq. ("Gilson") of Willian Olds Hofer Gilson & Lione Ltd. ("Willian Olds"), to assist Bouton in assuring that the trademark was properly registered.[2] In part as a result of the difficulties with the registration of the trademark, there was concern at Amurol that trademark litigation might ensue. Amurol therefore wished to have more substantial indemnification from Bouton in the event of litigation. Amurol also wanted to correct the representation in the Original

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[2] The registration ultimately issued in October 1983.

Agreement that Bouton had registered his trademark when, in fact, he had only applied for such registration.

For his part, Bouton was dissatisfied with Amurol's handling of Bouton's own concept for a Western shredded gum, under the BUCKAROO CHEW name. It was then discovered by Amurol that the Mars Candy Company had previously registered the trademark BUCKAROO for candy, but was not actively using the mark. As previously stated, Amurol had already developed a Western theme, and was therefore reluctant to use Bouton's concept. Nevertheless, Amurol purchased the BUCKAROO trademark from the Mars Candy Company and assigned the mark to Bouton. Because both parties were dissatisfied with the state of relations between them, but optimistic about the potential of BIG LEAGUE CHEW, they negotiated over certain revisions to the Original Agreement.

These negotiations culminated in a new agreement between the parties. The new agreement was signed in November of 1980, but was dated as of December 5, 1979. In effect, then, the November 1980 agreement superceded the Original Agreement and became known as the 1979 agreement (the "1979 Agreement").[3]

The 1979 Agreement provided that Bouton would receive a 2½% royalty rate on the sales of BIG LEAGUE CHEW. The 1979 Agreement also required that Amurol receive prior written approval from Bouton for all advertising and promotions. Paragraph 20 of the 1979 Agreement provided:

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[3] Bouton did not recall that there was a signed Original Agreement in 1979 before what later came to be known as the 1981 Agreement. Bouton explained that at the time of the Original Agreement, Alati was handling the negotiations and preparation of contracts for JBC, and the Original Agreement was drafted by Franklin, Weinrib and Rudell, attorneys for U.S. Licensing. I find Bouton's explanation for his failure of recollection to be entirely credible.

> The Terms of this agreement cannot be waived or modified except by an agreement in writing. There are no representations, warranties or covenants other than those set forth in this agreement which sets forth the entire understanding between us.

PTX 12. In addition to the 1979 Agreement, the parties executed a separate agreement relating to BUCKAROO CHEW, providing for royalty payments to Bouton for BUCKAROO CHEW.

The sales of BIG LEAGUE CHEW proved to be impressive; in 1981, sales of BIG LEAGUE CHEW totaled $18 million. When it became evident that the product would be a commercial success, the parties began to think about extending the term of the 1979 Agreement, which was originally set for a term of three years. Negotiations between Bouton, Alati, and JBC's counsel, James K. Silberman, Esq. ("Silberman") of Blum, Kaplan, Friedman, Silberman & Beran ("Blum Kaplan"), on the one side and Amurol and

its counsel on the other side resulted in the signing of a letter of intent (the "Letter of Intent") in August of 1981. The Letter of Intent was prepared and executed at that time to "avoid misunderstandings" as to the terms of revised agreement. DTX RR. Both parties wanted to be bound by the new terms, and were not sure how long it would take to draw up a new agreement, so they drew up the Letter of Intent. Bouton direct, Tr. at 83.

The Letter of Intent provided for an increase in the royalty rate to be paid Bouton and an extension of the license term, among other things. Specifically, the Letter of Intent provided for a sliding scale of royalty payments by which Bouton would receive 2½% on the first $20 million in annual sales, 3½% on the second $20 million, 5% on sales over $40 million, and 5% on all sales during the option period of the contract.

Bouton understood that he would receive the 5% royalty rate in either of two ways. First, if Amurol did not advertise, he would be entitled to 5%. Second, if Bouton did not approve advertising, he thought he was entitled under the contract to receive 5%. Bouton acknowledged, however, that the Letter of Intent nowhere explicitly provided that he would receive the full 5% under the second circumstance. Bouton cross, Tr. at 382-83.

From August 1981, when the Letter of Intent was signed, until June 1982, when the 1981 Agreement was signed, the parties operated under the terms of the Letter of Intent. Paragraph ten of the Letter of Intent provided that the royalty rate for BUCKAROO CHEW would increase from 1½% to 2½% and that all royalty payments for BIG LEAGUE CHEW would be made on a monthly basis. Upon signing the Letter of Intent in 1981, Amurol increased the royalty rate

on BUCKAROO CHEW to 2½% and started paying BIG LEAGUE CHEW royalties monthly instead of quarterly.

In June of 1982, approximately ten months after the signing of the Letter of Intent, an agreement was signed by the parties (the "1981 Agreement"). Between the signing of the Letter of Intent and execution of the 1981 Agreement, the parties continued to discuss whether certain terms would be included in the final agreement, but the 1981 Agreement as executed embodied all the elements set forth in the letter of intent. Bouton direct, Tr. 114.

The 1981 Agreement provided that Bouton retained the right to approve all advertising, and that he would have to give prior written approval of advertising. Bouton now claims that he understood he could receive a 5% royalty payment in either of the aforesaid two ways. This

interpretation was based on the interaction of paragraphs 4, 5 and 16(a) of the 1981 Agreement. Paragraph 4 provided that Amurol would pay JBC a royalty rate on a sliding scale of 2½% on the first $20 million in sales, 3½% on the next $20 million, 5% on all sales over $40 million, and 5% during the option period. This was the same sliding scale that was agreed to in the Letter of Intent. Paragraph 5 provided that Amurol was not obligated to advertise, and to the extent that Amurol "does not spend the following amounts for advertising, it shall remit the difference between its actual expenditure and the following amounts to JBC . . . :" on the first $20 million in sales 2½%, on the second $20 million in sales 1½%. Paragraph 16(a) provided that

> all artwork, copy, packaging, literary text, advertisements and advertising materials, including the quality and style thereof, shall be subject to the

> prior written approval of JBC; provided, however, that such materials shall be deemed approved if JBC does not notify the Company in writing to the contrary within seven (7) days after receipt.

PTX 66. Once again, as with the Letter of Intent, there was no indication in the contract that Bouton could refuse to approve advertising for no reason, and thereby gain a full 5% royalty, nor did Bouton ever express to anyone at Amurol that that was his view of the 1981 Agreement.[4]

Paragraph 29 of the 1981 Agreement provides in its entirety:

> The terms of this Agreement cannot be waived or modified

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[4] An earlier draft of the 1981 Agreement provided that "all artwork, copy, packaging, literary text, advertisements and advertising materials, including the quality and style thereof, shall at all stages of production be subject to prior written approval of JBC, which approval shall not be unreasonably withheld." PTX 54a, ¶17(a) (emphasis in original). This language was not included in the 1981 Agreement as it was finally executed.

> except by an agreement in writing. There are no representations, warranties or covenants other than those set forth in this Agreement which sets forth the entire understanding between the parties.

This paragraph does not explicitly require that any subsequent writing be formally executed or signed by both sides. It requires only that any modification be in writing.

The new agreement between the parties also contemplated the introduction of a candy product under the BIG LEAGUE trademark, identified as BIG LEAGUE PLUG. Atwater and Bouton agreed informally in a telephone conversation that the time by which Amurol had to introduce the BIG LEAGUE PLUG would be extended. That agreement was memorialized and confirmed in a handwritten letter dated September 20, 1982, PTX 70, which Atwater marked "attach to our contract." Both parties then

operated on the basis of the letter, although it was never formally executed by both parties as an amendment to the contract. The parties also agreed informally to extend the BUCKAROO CHEW trademark agreement, and confirmed that understanding by a telex. Bouton direct, Tr. 219-20; Neal direct, Tr. 780-81, 788, 790; PTX 122.

ADVERTISING AND PROMOTIONS

At the outset of the relationship, Bouton wanted advertising to promote the brand. Atwater, however, was reluctant to advertise because Amurol was 160,000 cases behind in deliveries, and could not keep up with the orders coming in. Until such time as Amurol could keep current with orders, Atwater thought advertising ill-advised. Once the back orders were processed, however, Atwater felt that advertising would be a good idea, and the parties agreed to advertise. Hence, the parties

included provisions relating to advertising in the Letter of Intent and in the 1981 Agreement.

The course of dealings between the parties became strained, however, because of Amurol's continual failure to consult with Bouton, much less gain his consent or approval, before embarking on an advertising campaign until considerable expenditures had been made. By the time he was consulted, Bouton felt compelled to go along with the advertisements because of the considerable sums of money already expended.

Bouton was concerned with the image of the product. He wanted to convey a macho sports image and felt that the product would benefit in the long run if a consistent image were built up. In order to convey that image consistently, Bouton wanted to be involved in the creative process of advertising, and the 1981

Agreement gave him that right.

Amurol used the advertising agency of Needham, Harper & Steers ("NH&S") for its advertising, as did its parent company, Wrigley. In 1981, NH&S developed and Bouton approved a commercial entitled "The Coach." This commercial was rejected by the networks, however, because it portrayed an authority figure telling children what to do. Accordingly, the commercial never aired. NH&S then developed the "Mad Professor" commercial, featuring a mad scientist concocting shredded bubble gum in a pouch in his basement. Bouton objected to Atwater that the commercial was juvenile, and that it did not properly reflect the image of the product that Bouton wished to convey. Bouton approved use of the commercial, but conditioned his approval on the running of modified and better commercials the following year.

NH&S then developed another

commercial, "You're in the Big Leagues." Bouton did not like this commercial, and made his objections known to Amurol and NH&S. He objected that the commercial could be used to promote any product, and that it appeared to be prepared by someone who knew nothing about sports. The commercial was first shown to Bouton after the initial creative process and after the storyboard had been completed. Because of the sizable expenditure of time and money already incurred, Bouton approved the commercial, and Amurol aired the "You're in the Big Leagues" commercial in 1982.

Bouton then went to another advertising agency, Della Femina, Travisano & Partners, Inc. ("Della Femina") to try to provide Amurol with new ideas. Bouton went to the Della Femina agency on his own, but Amurol paid half the fee for consulting that agency, even though Amurol was not obligated to do so, and there was no

written agreement that Amurol would do so. Della Femina suggested three different advertising themes to Amurol, but Amurol rejected all of them and continued to run the "You're in the Big Leagues" commercial.

Bouton pressed for one of the advertising themes suggested by Della Femina as an alternative to the "You're in the Big Leagues" commercial. The Della Femina advertisement that Bouton liked best was a parody of the Miller Lite Beer advertisements, in which celebrities argue whether Lite beer tastes great or is less filling. Bouton and Della Femina envisioned a commercial in which a child resembling Rodney Dangerfield would argue that BIG LEAGUE CHEW is shredded, while children resembling other celebrities in Miller Lite ads would argue that the gum came in a pouch. Bouton direct, Tr. 146. Amurol, however, did not want to engage in that type of advertising because it feared

a lawsuit from the people at the Miller Brewing Company. By letter dated February 1, 1984, Amurol informed Bouton that "Amurol being a part of the Wrigley Company would not want to engage in a legal battle with the Miller Brewing Company over such an issue." PTX 82. Amurol's brand manager for BIG LEAGUE CHEW wrote: "Mr. Wrigley would not allow us to proceed any further." PTX 86; see Atwater direct, Tr. at 496.

In 1983, Amurol again ran the "You're in the Big Leagues" commercial, despite the fact that Bouton protested that he did not like the commercial and had claimed to have approved it only conditionally for the 1982 advertising season. In 1983, Bouton and Atwater agreed that a new commercial would be run in 1984. This agreement was not reflected in any writing. Atwater promised Bouton that a new commercial would be prepared and aired in 1984. Bouton direct, Tr. at 149; Atwater direct, Tr. at 471-72.

In the Fall of 1983, Amurol requested Bouton's approval of a promotion called the Baseball Bonanza Instant Winner ("Baseball Bonanza"). The promotion featured a game card in each pouch of chewing gum. Each card had bases on it, and by scratching the covering off the bases, the buyer would see if he or she had won a prize. Atwater cross, Tr. 585. Bouton's creative input was not sought during the developmental and conceptual stages of the project. By letter dated February 1, 1984, PTX 82, Amurol sent Bouton the storyboard for the Baseball Bonanza commercial. Atwater and Amurol considered this to be a new commercial, but the storyboard was basically the "You're in the Big Leagues" storyboard with inserts focusing on the Baseball Bonanza. Amurol had announced the Baseball Bonanza Promotion and commercial to its brokers before Bouton had been consulted for his approval of the

commercial.

THE 1984 MODIFICATION

In February of 1984, Amurol wanted to run the Baseball Bonanza advertisement. NH&S had committed to the purchase of media time for the Baseball Bonanza commercials. Bouton refused, however, to give his consent. On or about February 16, 1984, at Amurol's direction, NH&S put the media network package on hold temporarily.

Atwater then went to the National Confectionery Wholesalers' Association convention in Anaheim, California, and, while there, spoke to Bouton by telephone on or about February 22, 1984. After some discussion, they came to an agreement: Bouton would relinquish all approval rights over advertising and promotions. In return for that, Bouton would receive a full 5% royalty payment on the sales of BIG LEAGUE CHEW. In addition, Atwater agreed that Amurol would not introduce a competing

shredded gum product. Bouton had Atwater read the terms to him over the telephone. Atwater agreed to send a telex setting forth the terms discussed over the telephone. Atwater then instructed his secretary at Amurol headquarters to send telexes to Bouton and Silberman confirming the agreement they had reached. Atwater's secretary sent telexes, but because of a problem with the telex transmission, also sent a confirmatory mailgram. Bouton received the mailgram, and compared to his notes of his agreement reached with Atwater on the telephone, and saw that they matched. At that point, both Bouton and Atwater testified that they had an understanding. Bouton cross, Tr. 347; Atwater direct, Tr. 506-08. Bouton then gave Atwater his verbal approval to run the Baseball Bonanza commercial.

The mailgram sent by Atwater to Bouton reads as follows:

> This is the text we talked about. Will be in touch with Gilson to draw up final papers next week.
>
> If Amurol Products Company elects to continue advertising, it will create and run advertising for BIG LEAGUE CHEW with a masculine sports theme featuring the brand in a quote macho unquote image.
>
> If promotional advertising is run, it will make every attempt to feature the brand in the same image.
>
> Any promotions to the consumer will continue to feature prizes which are sports-oriented and in keeping with the image of the brand.
>
> Amurol, in consideration of Jim Bouton Corporation relinquishing all approval of advertising and promotions, will, during the life of the contract, refrain from introducing another quote shredded unquote bubble gum which would compete with BIG LEAGUE CHEW. POPEYE and BUCKAROO CHEW, already on the market can continue to be produced and sold.

PTX 92.

Atwater testified that he and Bouton had an understanding at that point. The following colloquy between plaintiff's counsel and Atwater clearly demonstrates that Atwater and Bouton had reached an

agreement:

Q: Was it your understanding that this was -- do you think you had a mutual understanding as to what that clause meant, noncompete?

A: Yes. I think we had an understanding, yes.

Q: And so it would be fair to state that Mr. Bouton, as you had your discussions in Anaheim, Mr. Bouton understood that he would get a 5 percent royalty in the future?

A: An additional 2-1/2 percent which was proposed to him, yes.

Q: Which would be a total of 5 percent?

A: Yes.

Q: And, in turn, you would not compete in the future, is that correct?

A: Yes.

Q: And additionally, Mr. Bouton would agree to relinquish his approval rights over commercials?

A: Yes.

* * *

Q: . . . I am only asking you if you and Mr. Bouton, on or about the date that you sent your

telex or telegram, February 22, understood each other on those points?

A: Yes. We had a good understanding. Yes.

Atwater direct, Tr. 507-09. Despite this testimony, Atwater later said that it was his firm belief that there was no contract yet between them as to this modification because the lawyers had not reviewed the document. Atwater claimed that there would be no agreement until the lawyers for both sides read and commented on and drew up the agreement, and the parties signed it. Atwater cross, Tr. 595-97. Atwater's testimony on this point was strained and contradicted his earlier testimony that he and Bouton had reached an understanding. Tr. 507-512. Atwater's testimony on this point was also undercut by his statement that he thought the telex was a sufficient basis for him to produce the Baseball Bonanza commercial, without further

approval from JBC. Atwater cross, Tr. 597. It is not disputed that Atwater had authority to bind Amurol. See Atwater redirect, Tr. 676-77.

Bouton testified that he understood that the parties were bound from the moment they reached an agreement. Bouton stated that the document was to be given to the lawyers not for their review, but only to put the terms into more formal language. I find Bouton's testimony to have been credible on this point. He answered straightforwardly when asked about the lawyers' roles in drafting the final agreement, and his answers are consistent with his statement that he and Atwater had reached an agreement.

In effect, Atwater knew that he "had a gun to his head" Atwater direct, Tr. 492, and needed Bouton's approval to run the Baseball Bonanza advertisement. To get what he needed, he agreed to give Bouton

the full 5% royalty and also agreed not to introduce a competing "shredded gum in a pouch" product. Bouton, however, insisted on having something in writing. Bouton direct, Tr. 181, 184. The parties did discuss having the agreement drawn up by lawyers, but did not contemplate that lawyers would review the terms of the agreement. Bouton Direct, Tr. 185.

By letter dated February 28, 1984, Bouton's counsel confirmed that he no longer objected to the "Baseball Bonanza" commercial and authorized Amurol to use the commercial "based on the understandings as to modification of the Agreement which is to be reduced to writing in due course." DTX-DDD. The February 28 letter spelled out in further detail the February 22, 1984 modification. Specifically, the letter stated that Bouton relinquished all approval of advertising for BIG LEAGUE CHEW and BIG LEAGUE PLUG; that royalties would

be paid at the rate of 5% from January 1, 1984 to the end of the Agreement; that relinquishment of approval over advertising and promotion did not include relinquishment of the right to approve package graphics.

At that time or shortly thereafter, Silberman requested that Amurol pay Bouton at the increased royalty rate of 5%. Atwater thereupon directed Amurol's accounting department to pay Bouton a royalty of 5% of net sales without consulting Amurol's counsel and without having any written document other than the February 22 telex and Silberman's February 28 letter. Amurol paid a 5% royalty retroactive to January 1, 1984, and throughout the remainder of calendar year 1984. Indeed, an internal Amurol memorandum dated February 24, 1984 to Atwater from the BIG LEAGUE CHEW brand manager discussed where the money for the

additional 2½% royalty would come from. The memorandum deals with the "Royalty Payment Increase to Jim Boutin [sic] for Big League Chew," rather than the possibility of any proposed increase. PTX 93.

Production of the Baseball Bonanza commercial then went forward and the commercial was aired starting on April 14, 1984. The commercial stopped running at the end of July 1984 or beginning of August 1984. Atwater direct, Tr. 517. Shortly after the commercial stopped running, Amurol began to press Silberman about the draft of the final agreement. Amurol did not in any way inform JBC that it felt that no binding modification had been made to the 1981 Agreement until after the commercial had stopped running and it had secured the benefit of the bargain it had obtained from Bouton, namely, being able to run advertising for which it had already

blocked time.

Amurol sought and obtained Bouton's approval for package graphics in the period after the modification. Other promotions were run without seeking Bouton's approval, such as a jacket giveaway with the Atlanta Braves, and batting glove giveaways with the Louisville Redbirds and Texas Rangers. Thus, as they had operated in the past, Amurol and Bouton began performing under the February 22, 1984 telex immediately, without waiting for execution of a formal document.

As reflected in their exchange of correspondence in the week following the February 22, 1984 telex, the parties contemplated that the agreement would be reduced to writing. Bouton cross, Tr. 340-42; Atwater cross, Tr. 594-97. No letter or other document indicated that either party intended not to be bound until the finalized writing was executed, and no

testimony was given to the effect that one party said to the other that final execution of the agreement was required. The parties contemplated that the final writing would not be an entirely new contract; rather, they expected it to be a letter agreement, modifying certain paragraphs of the 1981 Agreement. Gilson direct, Tr. 723. The first mention by Atwater or anyone acting on behalf of Amurol to Bouton that an agreement had not been reached in February came after the Baseball Bonanza commercial stopped airing in late July or early August.

Shortly after the February 22 telex was sent, counsel for the parties reviewed the document. Gilson, counsel for Amurol, had a concern about the propriety of the no-compete clause under the antitrust laws. Gilson expressed his concern to Silberman, counsel to Bouton, who had the responsibility of drafting the formal

agreement. Silberman did not produce a draft of the modification until June of 1984. The no-compete clause was still in this draft, and Gilson recommended to Atwater that the clause either be deleted, or that it be approved by Amurol's antitrust counsel, Gordon Lang, Jr., Esq. ("Lang"), of Gardner, Carton & Douglas. Lang and David Braun, Esq., an associate at Gardner Carton & Douglas gave an oral opinion to Susan Somers Neal, Esq. ("Neal"), then an associate at Willian Brinks, to the effect that the no-compete provision was not per se illegal, but that it would be subject to scrutiny under the rule of reason, and that any claim raised about the clause would likely survive a motion to dismiss, and thus possibly involve Bouton and Amurol in long and costly litigation.

Over the next few months, various counter-proposals to resolve the difficulty

over the no-compete clause were put forward and rejected. Amurol agreed to give Bouton a 5% royalty on any competing shredded gum product that it introduced during the term of the agreement. Bouton rejected this offer, finding that it did not provide him with sufficient protection in the event Amurol manufactured and marketed a competing shredded gum product. Bouton feared that even paying him a 5% royalty on competing brands was not a sufficient disincentive to dissuade Amurol from bringing out a new product; Bouton feared that in the last years of the license agreement, Amurol would let BIG LEAGUE CHEW fall by the wayside and promote another gum in its place.

Accordingly, Bouton proposed that he be given a 5% royalty on competing brands in perpetuity. In that way, he would, in effect, own the trademarks to the competing brands. This would certainly provide a

disincentive to bringing out another shredded gum product. Amurol was unwilling to assign its rights in any trademark to Bouton. Instead, Amurol proposed that Bouton be given a 5% royalty on any competing shredded gum products for the life of the license agreement between Bouton and Amurol. Bouton wanted greater assurances and also wanted any such agreement to be contained in a separate contract so that U.S. Licensing would not be entitled to receive any portion of the royalty payments. Discussions between the parties continued until mid-November of 1984.

At that time, Neal and Gilson drafted a proposal that was substantially the same as their most recent proposal detailed above. Atwater took this proposal to a November 19, 1984 meeting with Bouton at Silberman's office in New York; but only Bouton and Atwater were present at the

meeting. The parties spoke for several hours, but could not reach agreement on an alternative to the no-compete language. When the meeting ended, Atwater left and took a taxi to the airport. Bouton later discussed the meeting with Silberman.

Over the 1984 Thanksgiving weekend, Silberman died. On the following Monday, November 26, 1984, Amurol's counsel informed Bouton that it intended to terminate discussions and would revert to the terms of the 1981 Agreement. Bouton then contacted another law firm, Amster, Rothstein & Engelberg and dealt with Morton Amster, Esq. ("Amster") of that firm. With Amster, Bouton drafted a letter to Amurol refusing to approve or disapprove of a storyboard for a commercial that Amurol had sent Bouton for approval.

On or about December 18, 1984, Amurol sought Bouton's approval for advertising and promotions, consistent with its

position that the February modification was of no effect, and the 1981 Agreement then in force required Bouton's approval. Bouton refused to approve or disapprove the advertising, consistent with his position that under the February 1984 modification he had relinquished that right.

In January of 1985, Amurol went back to paying Bouton royalty fees at the rate of 2½% as provided in the 1981 Agreement. Bouton then served a notice of breach on Amurol:

> This letter is to inform you that Jim Bouton Corporation believes that Amurol Products Company has materially breached the Agreement dated July 6, 1981 as amended. This material breach relates to the failure by Amurol Products Company to remit to the Jim Bouton Corporation royalties in the full amount at the rate of five percent (5%), in accordance with the modifications to Paragraph 4 of the Agreement.
>
> Pursuant to Paragraph 27 of the Agreement, Amurol Products Company has thirty (30) days within which to cure its breach. After the expiration of that time, Jim Bouton Corporation will have no alternative but to seek

> redress through the Courts, and thereby obtain a declaration of its right to obtain royalties at the rate of five percent (5%).

PTX 145. JBC did not claim a breach as to any other provision of the 1981 Agreement or February modification.[5] JBC attempted to work out its dispute with Amurol by letter dated February 19, 1985, from Amster to Amurol's counsel, and in that letter JBC expressly elected not to seek termination of the 1981 Agreement. DTX RRRRR.

CLAIMS OF THE PARTIES

JBC then filed this action in March 1985, when Amurol refused to pay the higher royalty rate to which JBC claimed it was entitled. In its original complaint, JBC claimed only that Amurol's failure to pay

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[5] Bouton subsequently filed a second notice of breach on October 26, 1987, relating to co-packing of BIG LEAGUE CHEW with other gum products in violation of the 1981 Agreement. PTX 165. Amurol cured that breach within thirty days as provided under paragraph 27 of the 1981 Agreement, and there remains no issue as to that purported breach.

the full 5% royalty rate violated the 1984 modification to the 1981 Agreement. Defendant Amurol counterclaimed for the additional 2½% royalty that it had paid Bouton during 1985. In 1987, however, JBC amended its complaint to assert additional causes of action. JBC has asserted three causes of action against Amurol in its amended complaint. First, JBC maintains that the 1981 Agreement was modified by the February 22 telex, either alone or in conjunction with the February 28 letter from Bouton's counsel, and that Amurol breached the 1981 Agreement as modified. This is essentially the same claim that formed the basis of the original complaint. Second, JBC alleges that, if no modification of the 1981 Agreement is found to have taken place, Amurol breached the 1981 Agreement because Bouton withheld approval of advertising during and after 1985, and was therefore entitled to the

full 5% royalty payment. Third, JBC seeks a declaratory judgment that Amurol has anticipatorily breached the terms of the 1981 Agreement by failing to work closely with Bouton, that such failure will continue to foreclose Bouton from meaningfully participating in the creation and development of advertising, and therefore warrants the equitable remedy of rescission of the 1981 Agreement.

JBC has requested the following relief: a determination that the 1981 Agreement was modified in February of 1984; an award of damages to bring JBC's royalty payments to 5% for the entire period after January 1, 1984; an injunction barring defendants from manufacturing, distributing, or selling competing shredded bubble gum products; an accounting of defendants' profits by reason of its sales of competing shredded gum products; a declaration that defendants have

anticipatorily breached the 1981 Agreement; a declaration that plaintiff is entitled to elect to terminate its relationship with defendants by reason of the anticipatory breach; and the costs of the action and reasonable attorney's fees.

WRIGLEY AS A PROPER PARTY DEFENDANT

Bouton contends that Wrigley is a proper party to this suit because of its involvement with and control over Amurol. In sum, Wrigley was mentioned during the trial with regard to the no-compete provision, its shipping policies, its policies on touring manufacturing facilities and its manufacture of gum at one point for Amurol. More specifically, each of these is discussed below, as follows.

When Bouton pressed Atwater to run the Miller Lite Beer ad parody, Atwater told Bouton that Wrigley would not want to get into a legal battle with the Miller Brewing

Company. Atwater direct, Tr. 496; PTX 82, 86. In the period just before the 1984 modification, Atwater contemplated that if Amurol could not use the advertising time it had reserved with NH&S to run the Baseball Bonanza commercial, Amurol would advertise another of its products or Wrigley would take over the time and use it to advertise Hubba Bubba bubble gum. Atwater direct, Tr. 504.

Wrigley also came up in connection with the no-compete provision in the February 22, 1984 telex. Bouton testified that Atwater said, "the Wrigley people were very hot under the collar" about Bouton owning the trademarks of competing brands. Bouton direct, Tr. 223; see Atwater cross, Tr. 617-18. Bouton also testified that Atwater threatened that Wrigley would come out with a competing product and let BIG LEAGUE CHEW "fall by the wayside." Bouton direct, Tr. 178. Atwater stated that he

merely invoked the name of Wrigley because he was mad. Atwater direct, Tr. 494. The Court finds his testimony on this point to have been entirely credible. Atwater wanted to pressure Bouton into giving in on the no-compete, and simply used the name Wrigley because he thought it would have extra weight.

Paul Rogers, now Chairman of Amurol, was a "rotating director" of Wrigley in 1979-1980, and at the same time was a director of Amurol. Bouton never negotiated with Rogers. Bouton direct, Tr. 115-16. Martin Garrity is vice-president of production for Wrigley, and was a board member of Amurol for one year between 1980 and 1988. There is no indication that Bouton ever negotiated with Garrity. Atwater is the nephew of William Wrigley and was vice-president of advertising of Wrigley from 1974 to 1979, but was never an officer or director of both Wrigley and

Amurol simultaneously. Atwater direct, Tr. 454-55. No other persons were board members of Amurol as well as Wrigley officers; nor were any Wrigley board members directors of Amurol. Atwater cross, Tr. 481.

Wrigley and Amurol both use the same law firm, Willian Brinks, and the same advertising agency, NH&S. Wrigley and Amurol have separate sales systems. Atwater direct, Tr. 538-39. Wrigley and Amurol also have separate manufacturing facilities, but when Amurol had a large backlog of orders to fill shortly after the initial marketing of BIG LEAGUE CHEW, Wrigley did manufacture gum, which was then shipped to be shredded. Atwater redirect, Tr. 658. Amurol would not let Bouton tour the manufacturing facility when he came to tour the Amurol offices because Wrigley and Amurol have a policy against allowing any non-employees into its production

facilities. Atwater direct, Tr. 462.

SUBSEQUENT DEVELOPMENTS

While this action was pending, in or about June of 1987, Amurol introduced a new shredded gum product under the mark GARFIELD STRIPES. That product does not have a sports theme.

On April 18, 1988, ccunsel for JBC moved to reopen the testimony and offer additional evidence, claiming that Bouton has recently discovered new facts relevant and necessary to its case. The new evidence relates to the no-compete clause of the February modification of the 1981 Agreement. In short, Bouton states that while attending the National Candy Wholesalers' Association in San Antonio, Texas, on February 27-28, 1988, he visited the Amurol display booth and discovered prototypes of three new shredded gum products: KING KONG, GODZILLA and WEREWOLF shredded bubble gum in a pouch. Affidavit

of Jim Bouton, sworn to on April 15, 1988, ¶¶ 4-5. None of these products has a sports theme.

CONCLUSIONS OF LAW

THE 1984 MODIFICATION

The Second Circuit has stated that the primary question in determining whether parties have bound themselves prior to the execution of a formal contract is whether the parties intended to be so bound. Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 261 (2d Cir.), cert. denied, 469 U.S. 828 (1984). As the Second Circuit phrased the issue:

> Did the parties intend not to be bound prior to execution of a formal contract? Or, did they merely contemplate that their informal agreement would be reduced to a formal writing at some later time?

Reprosystem, 727 F.2d at 261. The starting point for any discussion of the law must be the corollary general principles: (1) "if parties do not intend to be bound by an

agreement until it is in writing and signed, then there is no contract until that event occurs," R.G. Group, Inc. v. Horn & Hardart Company, 751 F.2d 69, 74 (2d Cir. 1984), and (2) "the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event" Reprosystem, 727 F.2d at 261 (quoting V'Soske v. Barwick, 404 F.2d 495, 499 (2d Cir. 1968), cert. denied, 394 U.S. 454 (1969)).

Accordingly, the first question the Court must answer is whether the parties intended to be bound before the execution of a final written document. The second question, assuming that the first is answered in the affirmative, is whether the writing is sufficiently definite to bind the parties.

In determining whether the parties

intended to be bound by something short of a written agreement, the courts have looked to certain factors. First among them is whether the parties explicitly stated that they intended to be bound only when a written agreement is signed. R.G. Group, 751 F.2d at 75; Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 262 (2d Cir.), cert. denied, 469 U.S. 828 (1984). A second factor is whether one party has partially performed. R.G. Group, 751 F.2d at 75-76; V'Soske v. Barwick, 404 F.2d 495 (2d Cir. 1968), cert. denied, 394 U.S. 921 (1969). A third factor is whether there was nothing left to negotiate or settle, so that signing was a mere ministerial act. R.G. Group, 751 F.2d at 76; Banking & Tradino Corp. v. Floete, 257 F.2d 765, 769 (2d Cir. 1958). A fourth factor is whether the agreement concerns complex business matters where the requirement of a writing is the norm rather than the exception. R.G.

Group, 751 F.2d at 76; International Telemeter v. Teleprometer Corp., 592 F.2d 49, 57-58 (2d Cir. 1979) (Friendly, J., concurring). And, as the Second Circuit has held, mere intention to commit the agreement to writing will not prevent contract formation prior to execution. Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2d Cir. 1985).

Application of the four R.G. Group factors in this case leads to the conclusion that there was an effective modification of the 1981 Agreement.

The first factor is whether the parties explicitly stated that they did not intend to be bound until a written, signed agreement was effectuated. In this case, paragraph 29 of the 1981 Agreement provides:

> The terms of this Agreement cannot be waived or modified except by an agreement in writing. There are no representations, warranties or

> covenants other than those set forth in this Agreement which sets forth the entire understanding of the parties.

The 1981 Agreement therefore contemplates modification only by written agreement. The terms of the February 22, 1984 mailgram were agreed to by both sides and, needless to say, the mailgram was in writing. It should be noted, however, that the 1981 Agreement does not explicitly require the agreement to be signed by both parties in order to be valid.

The confirming mailgram states: "This is the text we talked about. Will be in touch with Gilson to draw up final papers next week." PTX 92a. This is fully consistent with the view that the parties had reached an agreement, in writing, and contemplated that the agreement would later be formalized. At no time until after the Baseball Bonanza commercial stopped running did Amurol express to JBC its claimed view

that a binding modification had not been effected. Accordingly, the first factor weighs in favor of a finding that the parties intended to be bound when they reached agreement on February 22, 1984.

The second factor is whether one party has partially performed. It is clear that the conduct of the parties, after the modification was allegedly reached, is relevant in determining whether the parties had indeed conclusively modified the agreement. See Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum. L. Rev. 217, 262 (1987). The conduct of the parties both contemporaneously with the sending of the mailgram and after its mailing indicates that the parties intended to be bound by the terms of the February 22, 1984 telex. In this case, both parties partially performed. Bouton relinquished his right to disapprove of the Baseball

Bonanza commercial, and Amurol began paying Bouton almost immediately at the rate of 5%. At no time did Atwater or anyone at Amurol state that the increase in royalty payments was merely an accommodation. Accordingly, the second factor weighs heavily in favor of finding that there was a binding contract.

The third factor is whether there was nothing left to negotiate or settle. In this case, the differences between the parties later emerged, but those differences were not present when Atwater and Bouton agreed to modify the 1981 Agreement. The Court is mindful of Judge Pratt's cautionary words that:

> The actual drafting of a written instrument will frequently reveal points of disagreement, ambiguity, or omission which must be worked out prior to execution. Details that are unnoticed or passed by in oral discussion will be pinned down when the understanding is reduced to writing. These considerations are not minor;

> indeed, above a certain level of investment and complexity, requiring written contracts may be the norm in the business world rather than the exception.

R.G. Group, 751 F.2d at 75. But in this case, the parties debated over an agreement for several weeks before the February 22 agreement was reached. That modification was the product of intense negotiations between Bouton and Atwater. The parties negotiated over language, and, when they finally reached an agreement, they committed that agreement to writing. The parties reached a firm understanding, and this is not seriously disputed. See Atwater direct, Tr. 506-509.

The fourth factor is whether complex business matters are involved that would ordinarily require a writing. In this case, the course of dealings between the parties was to have important documents in writing but not necessarily formally executed by the parties. For example,

Atwater and Bouton agreed over the telephone that Amurol would be granted an extension of time within which to introduce BIG LEAGUE PLUG. Bouton then confirmed that understanding in a handwritten letter. PTX 70. The parties informally agreed to extend the BUCKAROO CHEW trademark agreement, and confirmed that understanding by a telex. Bouton direct, Tr. 219-20; Neal direct, Tr. 780-81, 788, 790; PTX 122. Those matters involved significant sums of money. The amount of money at stake here was an additional 2½% royalty, or an amount that would total approximately $200,000 per year at the rate of net sales in 1984. Surely that is no small amount. Nevertheless, Amurol's counsel testified that he expected this to be only a letter agreement, not a completely new contract. Gilson direct Tr. 723. That is precisely what the parties agreed to -- an informal agreement, in keeping with their customary

way of doing business.

Application of these four factors reveals that the parties intended to be bound before execution by Amurol and JBC of a final written document.

SUFFICIENCY OF THE 1984 MODIFICATION

Section 15-301 of the General Obligations Law of New York provides in pertinent part:

> 1. A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent.

N.Y. Gen. Oblig. L. §15-301 (McKinney's 1978). This provision is a Statute of Frauds requirement, but is more specific than the general Statute of Frauds provision under New York Law. See § 5-701. The purpose of the Statute of Frauds is to guarantee that there is some evidence of

contract, and that one-party does not simply claim that an oral modification was made without submitting some proof of such a claim. In this case, it is clear beyond cavil that there was a writing sufficient to satisfy section 15-301. The February 22, 1984 mailgram contained the material provisions of the agreement between Bouton and Atwater.

The only possible question as to the enforceability of the February 1984 modification is whether the terms of the February 22, 1984 mailgram are sufficiently definite and include all material terms. The Second Circuit has recently reaffirmed the well-settled principle that "[t]o be enforceable an agreement must contain, either expressly or by implication, all of the terms deemed material by the parties." Cinema North Corp. v. Plaza at Latham Associates, 867 F.2d 135, 140 (2d Cir. 1989); see Enercomp, Inc. v. McCorhill

Publishing, Inc., No. 88-7323, slip op. 2649, 2669-70 (2d Cir. 1989); V'Soske v. Barwick, 404 F.2d 495, 500 (2d Cir. 1968), cert. denied, 394 U.S. 921 (1969).

WRIGLEY AS A PROPER PARTY

Plaintiff contends that Wrigley is a proper party to this suit because there exists a unity of interest between Amurol and Wrigley and because "Wrigley dominates and controls Amurol to such an extent that Amurol is a mere instrumentality." Plaintiff's Post-Trial Proposed Conclusions of Law ¶ 59. This contention is unfounded. The only evidence of control that plaintiff has adduced is that Paul Rogers has served on the board of directors of Wrigley and on the board of directors of Amurol and that Martin Garrity served on the Amurol board of directors and was vice-president of production for Wrigley. At several times during the negotiations, Atwater invoked the name of Wrigley. Beyond that, however,

there was no indication that Wrigley had any involvement in the dealings here at issue. First, Wrigley was not a party to any agreement with Bouton. Amurol and Wrigley are separate corporate entities. Even the 1984 modification, which resulted in part because of Bouton's fear that Wrigley would introduce a direct competitor to BIG LEAGUE CHEW, did not mention Wrigley. Bouton has failed to make a showing sufficient to justify the extraordinary relief of going behind corporate formalities when they are maintained in good faith. Plaintiff has set forth the correct legal standard, however: in order to go behind corporate formalities, a party must show:

(1) that the parent controls and dominates the subsidiary to such a degree that the subsidiary is a mere instrumentality of its parent;

(2) that through its domination and control of the subsidiary the parent is perpetrating a fraud

> or working an injustice . . . ; and
>
> (3) these elements result in an unjust loss or injury to the party disavowing corporate independence, such as the insolvency of the subsidiary.

United Rubber, Cork, Linoleum and Plastic Workers v. Great American Industries, 479 F. Supp. 216, 242 (S.D.N.Y. 1979); see American Protein v. AB Volvo, 844 F.2d 56, 60 (2d Cir.), cert. denied, 109 S. Ct. 136 (1988). As the Second Circuit has recently noted, there is a presumption of separateness that is entitled to substantial weight, American Protein, F.2d at 60, and Bouton has failed to overcome that presumption. Accordingly, Wrigley is not a proper party to the suit and is hereby dismissed as a defendant.

JBC'S CLAIM FOR BREACH OF THE 1981 AGREEMENT

Bouton contends alternatively that Amurol breached the 1981 Agreement by its failure to obtain Bouton's approval for

commercials run in 1985, 1986 and 1987. Amurol contends, however, that it ran a commercial that had been approved for 1982, and that once approval is given, such approval cannot be withdrawn. Bouton, on the other hand, contends that he made it clear to Atwater that he did not approve the running of "You're in the Big Leagues" beyond the 1983 advertising season. Bouton consented to Baseball Bonanza running in 1984 in reliance on what he thought was the binding 1984 modification. Acting under that alleged agreement, Bouton refused to approve or disapprove advertising and promotions. Because Amurol ran unauthorized advertising, Bouton claims he is entitled to an additional 2½% royalty as provided in ¶ 5 of the 1981 Agreement.

In the event that the Court finds that there was no modification to the 1981 Agreement, JBC claims that the 1981 Agreement was breached by Amurol. In light

of the Court's finding that the 1981 Agreement was effectively modified in February 1984, the Court need not reach this issue. Nevertheless, for the sake of completeness, the Court addresses plaintiff's arguments. Plaintiff has failed to show that there was a breach of the 1981 Agreement by reason of Amurol's failure to pay Bouton a royalty at the rate of 5%.

JBC relies on the interrelationship of paragraphs 4, 5 and 16(a) of the 1981 Agreement to support its position that Amurol breached the 1981 Agreement. JBC contends that it had the right to refuse to approve all advertising, for any reason or for no reason at all, and thereby to become entitled to a full 5% royalty. In effect, JBC contends that because an earlier draft of the 1981 Agreement provided that JBC "shall not unreasonably withhold" its approval, JBC had no obligation to deal

fairly with Amurol in this regard. Such a contention is untenable. It is well settled that there is implicit in every contract a covenant of good faith and fair dealing. See, e.g., Durham Industries v. North River Ins. Co., 673 F.2d 37, 41 (2d Cir.) cert. denied, 459 U.S. 827 (1982). The mere fact that the 1981 Agreement did not explicitly provide that Bouton could not unreasonably withhold his approval does not in any way mean that there was no covenant of good faith and fair dealing in the contract.

Furthermore, the very terms of the contract preclude the interpretation that Bouton seeks here to establish. Paragraph 16(a) provides that materials "shall be deemed approved if JBC does not notify the Company in writing to the contrary within seven (7) days after receipt." JBC has not notified Amurol that it disapproves of advertising that Amurol has been running

because JBC has been operating under the assumption that the 1981 Agreement was effectively modified in 1984. Accordingly, under the terms of the 1981 Agreement, JBC is deemed to have approved the advertising and promotions run by Amurol. JBC's claim for relief for breach of the 1981 Agreement must, for this reason alone, be denied.

JBC's CLAIM FOR TERMINATION

Plaintiff seeks a declaratory judgment that Amurol has anticipatorily breached the 1981 Agreement, and that JBC is therefore entitled to elect to terminate the 1981 Agreement. This view is unfounded in the facts and in the law. Paragraph 27 of the 1981 Agreement provides that, in the event of a material breach, the other party may terminate the agreement by giving the thirty days notice. At no time did JBC give notice that Amurol's conduct in this regard constituted a material breach of the 1981 Agreement. Moreover, plaintiff has

forfeited any right it might have had to rescind the 1981 Agreement by continuing to receive the benefits of the contract after the events which would arguably be cause for termination. In such a situation, the party that chooses to accept the continued benefits under the contract cannot then terminate the agreement when it is convenient. Apex Pool Equipment v. Lee, 419 F.2d 556, 562-63 (2d Cir. 1969). As noted above, Bouton chose not to seek termination of the 1981 Agreement when it commenced this lawsuit. See supra p.26; Bouton cross, Tr. 429-30; DTX RRRRR.

Furthermore, a claim for anticipatory breach requires unambiguous repudiation of the contract. Tenavision, Inc. v. Neuman, 45 N.Y.2d 145, 150, 408 N.Y.S.2d 36, 38 (1978); Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314, 321-22 (2d Cir. 1985); Restatement (2d) of Contracts §253; Farnsworth, Contracts §

8.21 at 634 (1982). Amurol has not taken any action to repudiate the 1981 Agreement. In fact, by exercising its option to extend the contract and repeatedly asserting its desire to continue as JBC's licensee, it has clearly indicated that it intends to perform fully its obligations under the contract.

Finally, Bouton has testified that Amurol has been more cooperative since the commencement of this action. Bouton direct, Tr. 288-89. Therefore, if ever there were cause for Bouton to terminate the contract, such cause, by Bouton's own admission, is not sufficiently likely to continue in the future to warrant a declaration that Amurol has anticipatorily breached the 1981 Agreement.

AMUROL'S COUNTERCLAIM

Amurol has counterclaimed for $301,396.50, the amount by which its payment to Bouton exceeded the 2½% royalty

rate it claims should have been paid. In light of the Court's ruling on Bouton's claim, it is evident that Amurol cannot succeed on its counterclaim. There was an effective modification to the 1981 Agreement, and Amurol has no claim to recover money paid to Bouton as an accommodation because Bouton was entitled to receive that money.

Moreover, even were the Court to rule in favor of Amurol on Bouton's claim, Amurol has failed to prove a claim for relief for unjust enrichment. To state a cause of action under New York law for unjust enrichment, a party must show: (1) that the defendant was enriched, (2) that such enrichment was at plaintiff's expense and consists of property rightfully belonging to the plaintiff, and (3) that the circumstances require, in equity and good conscience, that the money be returned to the plaintiff. Bank of Castle v.

Salerno, 99 A.D.2d 663, 663-64, 471 N.Y.S.2d 924, 925 (4th Dep't 1984); Spallina v. Giannoccaro, 98 A.D.2d 103, 105, 469 N.Y.S.2d 824, 826 (4th Dep't 1983); Chase Manhattan Bank v. Banque Intra S.A., 274 F. Supp. 496, 499 (S.D.N.Y. 1967); see Reprosystem, 727 F.2d at 263.

The facts are clear that JBC was enriched at Amurol's expense. There is no suggestion, however, of any unjust enrichment of plaintiff. JBC received the money in exchange for relinquishment of its advertising approval rights. Amurol made the payments in order to get out of a difficult situation. There was never any mention by Amurol that it was paying the 5% royalty rate only on condition that an acceptable final document would be executed. Indeed, Atwater testified that it was not until after his attorneys informed him that he was entitled to get back the money he paid to Bouton that he

thought he could get the money back. At no time did he suggest to Bouton that the money advanced was only an accommodation. Atwater cross, Tr. at 519-20; see Bouton direct, Tr. 285. Under these circumstances, there is nothing unjust about plaintiff's retaining the money paid it by Amurol in 1984.

ATTORNEY'S FEES

JBC has also requested that the Court grant plaintiff 30% of its attorney's fees for two reasons. First, it claims that Amurol's counterclaim is frivolous, and sanctions should be awarded for a total of 15% of plaintiff's fees. Second, plaintiff claims that it should be awarded an additional 15% because of Amurol's change of counsel that required additional pretrial prreparation and trial examination of Gilson and Neal. The Court had stated at a pretrial conference that an award of counsel fees might be appropriate if the

substitution of counsel that resulted when Amurol's present counsel were substituted for Willian Brinks caused added expense to plaintiff. The Court also notes that Defendants have reserved their right to seek attorney's fees for the amendment to the complaint to add plaintiff's second and third claims for relief. Consistent with the Court's comments before trial, the Court will not preclude either party from making a formal motion for attorney's fees. Plaintiff's informal application is denied on the current record.

CONCLUSION

The parties reached an agreement, in writing, to modify the 1981 Agreement. Amurol now refuses to abide by that modification. This it cannot do.

Accordingly, it is hereby ordered that judgment be entered for the plaintiff on its first claim for relief that Amurol has breached the 1981 Agreement as modified by

failing to pay JBC the full 5% royalty to which it is entitled under the 1984 modification. Plaintiff shall be entitled to an accounting of the royalties payable from January 1, 1985 to the beginning of the option period, and shall receive damages amounting to the difference between 5% and the royalty actually received for that period. Amurol shall be enjoined from producing, selling or distributing any "shredded" gum in a pouch. Amurol shall make an accounting to JBC of all profits earned as a result of the sales of competing "shredded" gum in a pouch other than POPEYE and BUCKAROO CHEW and pay to JBC a royalty of 5% on those sales. In light of this ruling, it is unnecessary to reopen the proceedings to accept further testimony, as requested by Bouton, and plaintiff's motion to reopen the trial testimony is denied on this basis.

Wrigley is hereby dismissed as an

improper defendant. Judgment shall be entered for defendant on plaintiff's second and third claims for relief. Judgment shall be entered for plaintiff on defendant Amurol's counterclaim. Plaintiff's application for attorney's fees is denied on the current record.

Plaintiff is hereby ordered to submit a judgment on or before July 28, 1989.

SO ORDERED

Dated: New York, New York
July 7, 1989

Peter K. Leisure
UNITED STATES DISTRICT JUDGE

No. 90-216

Supreme Court, U.S.
FILED
AUG 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JIM BOUTON CORPORATION,

Petitioner,

—against—

WM. WRIGLEY JR. COMPANY and
AMUROL PRODUCTS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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August 29, 1990

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals properly reverse the District Court judgment, where the Court of Appeals found that judgment was contrary to well-settled New York contract law and based upon clearly erroneous fact-finding?

2. Does Fed. R. Civ. P. 52(a) impose an obligation on a court of appeals to accept unquestioningly a district court's factual findings, even when it finds them clearly erroneous?

DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Supreme Court Rule 29.1, respondents state that Wm. Wrigley Jr. Company is the corporate parent of Amurol Products Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-210

JIM BOUTON CORPORATION,

Petitioner,

—against—

WM. WRIGLEY JR. COMPANY and
AMUROL PRODUCTS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The petition of Jim Bouton Corporation ("JBC") raises no more than the question of whether the United States Court of Appeals for the Second Circuit properly applied the clearly erroneous standard of review set forth in Fed. R. Civ. P. 52(a). The unanimous decision of the Court of Appeals meticulously applied that standard and found that the judgment of the District Court was clearly erroneous under well-settled New York contract law. There is simply no general issue in this case warranting the exercise of this Court's supervisory powers.

COUNTERSTATEMENT OF THE CASE

A. Counterstatement of the Proceedings Below

In March 1985, JBC brought this diversity action in the United States District Court for the Southern District of New York. JBC claimed that in 1984 JBC and respondent Amurol Products Company ("Amurol") entered into a modification of their existing trademark licensing agreement and that Amurol had breached that modified agreement.[1] After a non-jury trial, the District Court issued findings of fact and conclusions of law in which it ruled under New York law that the parties had modified their agreement and that Amurol had breached the modification agreement. *See* Pet. App. 71a-82a.[2] The District Court awarded JBC nearly $1 million in additional royalties plus interest, and granted a permanent injunction enforcing a non-competition provision that the court found was part of the modification agreement. Pet. App. 94a-96a. The District Court also awarded damages for violations of that judicially crafted non-competition provision. *Id.*

The Court of Appeals reversed the District Court judgment, holding that (1) the writings JBC contended constituted the modification agreement were not sufficient to satisfy the requirement in the existing trademark licensing agreement that a modification could be effected only by an "agreement in writing" (902 F.2d at 1080; Pet. App. 15a); (2) those same

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1 Amurol's corporate parent Wm. Wrigley Jr. Company ("Wrigley"), which JBC also sued, was dismissed as a defendant by the District Court and JBC did not appeal that disposition. Wrigley did not participate in the proceedings in the Court of Appeals and is not a respondent in this Court. JBC's identification of Wrigley as a respondent in the caption of its Petition for Writ of Certiorari is erroneous.

2 Citations to the District Court's unreported opinion are to the petitioner's appendix ("Pet. App."), attached to its Petition for Writ of Certiorari ("Pet."). *See* Pet. App. 20a-96a. Citations to the Court of Appeals' opinion are to both the reported opinion and the petitioner's appendix. *See Jim Bouton Corp. v. Wm. Wrigley Jr. Co.*, 902 F.2d 1074 (2d Cir. 1990); Pet. App. 1a-19a.

writings did not meet the requirements of section 15-301(1) of New York's General Obligations Law that a written contract prohibiting oral modifications "cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement is sought or by his agent" (902 F.2d at 1080; Pet. App. 16a-17a); and (3) under well-settled New York common law contract principles, the parties had exhibited an intent not to be bound except by a formal agreement signed by the parties and that no such writing had ever come into being (902 F.2d at 1081; Pet. App. 16a-17a). Any of these three bases for the Court of Appeals' disposition alone would have been sufficient to reverse the District Court's judgment.

In reaching its decision, the Court of Appeals carefully reviewed the record as a whole, applied the clearly erroneous standard pursuant to Fed. R. Civ. P. 52(a), and found that it had a "definite and firm conviction that the district court erred in holding" that the parties had entered into a binding modification agreement. 902 F.2d at 1080; Pet. App. 15a.

B. Counterstatement of the Facts

Respondent Amurol is a manufacturer of candy, gum, and other food and novelty products. Pet. App. 24a-25a. Since 1980, Amurol has sold a shredded bubble gum in a pouch product marketed under the trademark "Big League Chew," which it licenses from JBC. Pet. App. 29a. By 1984 the parties' "Big League Chew" relationship had been governed by three successive formal, written trademark licensing agreements, the most recent being the so-called 1981 Agreement, under which JBC received a 2½% royalty for the use of its trademark. Pet. App. 29a-40a. As with the two predecessor contracts, the 1981 Agreement explicitly provided that no modifications were permitted "except by an agreement in writing." Pet. App. 38a-39a.

A dispute arose in early 1984 over JBC's refusal to approve certain advertising. Pet. App. 46a-47a. The parties had a series of telephone conversations and one exchange of

correspondence in February 1984 looking toward a possible contractual modification to deal with the problem. Pet. App. 47a-54a. The proposals being discussed would have doubled JBC's royalty to 5% in exchange for JBC's relinquishing any right to approve advertising (Pet. App. 53a-54a); Amurol would also have agreed not to introduce another shredded bubble gum in a pouch that would compete with Big League Chew (Pet. App. 49a).

On February 22, 1984 Amurol's president dispatched a mailgram summarizing some, but not all, of the terms the parties understood would be part of any final agreement. *See* Pet. App. 49a (text of mailgram). Most prominently, the mailgram did not mention the 5% royalty provision that JBC sought.[3] *Id.*; *see* 902 F.2d at 1076, 1077, 1080; Pet. App. 5a, 7a-8a, 15a. The mailgram also clearly stated that Amurol would ask its lawyer to prepare "final papers." Pet. App. 49a.

On February 28, 1984 JBC's attorney sent a letter to Amurol in which he acknowledged that the mailgram only contained "[p]art of the understanding" between the parties and in which he added certain additional conditions upon which any final agreement was to be predicated. 902 F.2d at 1077; Pet. App. 7a (text of letter). Specifically, the February 28 letter added the 5% royalty term that had been left out of the mailgram and made additional counter-proposals regarding package graphics and use of the exterior of the package to sell other products. *Id.* The language of the February 28 letter, drafted by JBC's own lawyer, was hardly the language of a lawyer confirming the existence of a binding agreement. The letter concluded:

> If your understanding comports with the above, *we will operate on the assumption that an acceptable writing will come into being* and, on behalf of the Jim Bou-

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3 Although JBC's petition repeatedly refers to the mailgram as containing the terms of the parties' supposed agreement (Pet. 13-15, 23-24), nowhere does the petitioner acknowledge that the mailgram lacked the crucial royalty provision.

> ton Corporation, I hereby give Amurol authorization to run the TV ad *for 1984*.

Id. (emphasis added). The letter granted permission to run the disputed advertisement only in 1984, and did not purport to yield JBC's approval over advertising for the duration of the 1981 Agreement. 902 F.2d at 1077; Pet. App. 8a.

Immediately following that exchange of correspondence and for nine months thereafter, the lawyers for both parties worked at drafting a binding contractual modification. Pet. App. 57a. Proposals and counter-proposals were exchanged, but no final agreement was ever reached. *Id.* In particular, the parties were never able to agree on what limitations should be placed on Amurol's right to introduce another shredded bubble gum. *Id.* Throughout this nine-month period of active negotiations, neither JBC nor its attorney resisted the continuing negotiations on the ground that a binding modification had already been reached in February. *See* 902 F.2d at 1080; Pet. App. 15a. JBC first made such a claim only well after the fact—when the negotiations broke down in failure at the end of 1984. *See* Pet. App. 63a.

SUMMARY OF ARGUMENT

In its review of the fact determinations of the District Court, the Court of Appeals properly applied the clearly erroneous standard set out in Rule 52(a) of the Federal Rules of Civil Procedure. Upon review of the evidence as a whole the Court of Appeals found that the trial judge committed clear error by ignoring or misconstruing undisputed documents and facts contained in the record. The Court of Appeals found that the record as a whole required a finding that the parties had not entered into a binding contractual modification under controlling New York law. A proper application of the correct standard of review by the Court of Appeals does not warrant this Court's review.

ARGUMENT

I. The Decision of the Court of Appeals Properly Applied the Clearly Erroneous Standard as Articulated in the Federal Rules of Civil Procedure and the Decisions of this Court

JBC's only basis for invoking this Court's power of review is its claim that the Court of Appeals mechanistically invoked the clearly erroneous standard of review (Pet. 20), flouted that standard (Pet. 36) and in fact reviewed the case *de novo* (Pet. 20). In reality, JBC's complaint is that it disagrees with the conclusion the Court of Appeals reached after properly applying the clearly erroneous standard of review.

A. The Court of Appeals Applied the Proper Standard of Review

This case does not involve abusive or improper review. A unanimous Court of Appeals found that its "review of the record, much of which is in the form of written documents, leaves us with the definite and firm conviction that the district court erred in holding [that a binding agreement had been entered into]. *See Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 261 (2d Cir.), *cert. denied*, 469 U.S. 828 (1984)." 902 F.2d at 1080; Pet. App. 15a. The "definite and firm conviction" language used by the Court of Appeals comes from *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), which, like *Reprosystem*, applied the "clearly erroneous" standard.[4]

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4 In *Reprosystem*, just as in the present case, the Court of Appeals applied the "clearly erroneous standard of review embodied in Federal Rule of Civil Procedure 52(a)" to reverse a finding by the District Court that the parties had entered into a binding contract. 727 F.2d at 261. The court in *Reprosystem* articulated that standard as follows: "the district court's finding that the parties intended to be contractually bound prior to execution of the formal contracts must be upheld unless it was made without adequate evidentiary support, is against the

Under Fed. R. Civ. P. 52(a), "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985), this Court explained in detail that although the meaning of the phrase "clearly erroneous" in Rule 52(a) is not immediately apparent, certain general principles apply. First among those is the principle articulated in *United States Gypsum* "that '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson*, 470 U.S. at 573 (quoting *United States Gypsum*, 333 U.S. at 395). That is precisely the standard applied by the Court of Appeals in the present case.

The petitioner attempts to assert that the Court of Appeals failed to give adequate consideration to "credibility determinations" made by the District Court. But in *Anderson* itself, this Court cautioned:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the Court of Appeals may well find clear error even in a finding purportedly based on a credibility determination.

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clear weight of the evidence, or was induced by an erroneous view of the law." *Id.* The court's "review of the entire record" in *Reprosystem* left it "with the definite and firm conviction that a mistake was made by the district court . . . ." *Id.* (citing *United States Gypsum*, 333 U.S. at 395). This Court declined to review the Second Circuit's decision in *Reprosystem*, 469 U.S. 828 (1984).

Id. at 575; *see also United States Gypsum*, 333 U.S. at 396.[5]

This case was a particularly appropriate one for the Court of Appeals to rely upon documentary evidence. Under New York law, the parties' intent to be bound is not to be determined by assessing subjective assertions of intent, such as those that would come from the self-serving trial testimony of the contracting parties. Rather, New York courts have long maintained that objective manifestations of intent—especially the parties' behavior around the time the contract was allegedly formed as exemplified in written documents—provide the most reliable indication of the parties' intent. *See, e.g., Scheck v. Francis*, 26 N.Y.2d 466, 470, 260 N.E.2d 493, 494-95, 311 N.Y.S.2d 841, 843 (1970) (per Fuld, C.J.) (intent not to be bound determined based on writings before the court alone); *EDP Medical Computer Systems, Inc. v. Sears, Roebuck & Co.*, 149 A.D.2d 563, 564, 540 N.Y.S.2d 18, 19-20 (2d Dep't) (intent not to be bound determined based on "written exchanges between the parties"), *appeal dismissed*, 74 N.Y.2d 873, 547 N.E.2d 95, 547 N.Y.S.2d 840 (1989). Under New York law, the after-the-fact testimony of parties about what they had in mind at the time is given little weight when compared with the parties' objectively determinable actions at the time. *See id.*; *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989) (where lan-

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5 Plaintiff relies on this Court's decisions in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1981), to bolster its claim that the Court of Appeals applied an improper standard of review. Neither of those cases is applicable. In *Icicle Seafoods*, the Court of Appeals, functioning under an erroneous interpretation of earlier cases decided by this Court, explicitly applied a *de novo* standard of review when it should have applied the clearly erroneous standard. 475 U.S. at 712-13. In *Inwood Laboratories*, the Court of Appeals weighed the evidence differently than the district court, but never found that the district court committed clear error. 456 U.S. at 853. Neither of those cases applies here, where the Court of Appeals openly relied on the clearly erroneous standard and properly found that the District Court had committed clear error. *See id.* at 864 (Rehnquist, J.) (concurring in the result).

guage of documents supposedly constituting an agreement is clear, no need to look at other indications of parties' intent not to be bound); *see also Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 590 (2d Cir. 1987); *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 74 (2d Cir. 1984).

In this case, the Court of Appeals discussed the evidence extensively, weighed it as a whole, and then unanimously found that the District Court's findings were clearly in error. The District Court could not explain why the central 5% royalty term was missing from the mailgram, why JBC's lawyer needed to send the February 28 letter if the mailgram already constituted a contract, and why the parties negotiated for nine months after the mailgram was sent if they already had a contract. 902 F.2d at 1080; Pet. App. 15a. In short, the Court of Appeals acted well within the bounds of the standard of review articulated in Rule 52(a) and explained in *Anderson*.[6]

B. The Court of Appeals Properly Concluded that the District Court's Findings Were Clearly Erroneous

The application of the clearly erroneous standard in this case presents no general issue that warrants this Court's review. Moreover, the Court of Appeals' ultimate conclusion was correct: as a matter of New York contract law, the parties did not enter into a binding contractual modification and the District Court was clearly wrong in finding to the contrary. Under New York law, it is clear that even if parties negotiating a proposed agreement come to an "understanding" as to the terms of their agreement, they will not be bound by that understanding until they have reached a final

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6 Contrary to JBC's contention (Pet. 11), the clearly erroneous standard of review does not impose an "obligation" on a court of appeals to acquiesce unquestioningly in the findings of the district court. *See, e.g., United States Gypsum*, 333 U.S. at 396; *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1505 (4th Cir. 1988) (clear error can be found when credibility determinations are contradicted by documentary or objective evidence).

agreement that they intend to be binding. *See Arcadian Phosphates*, 884 F.2d at 70; *Feick v. Fleener*, 653 F.2d 69, 79 (2d Cir. 1981); *Schwartz v. Greenberg*, 304 N.Y. 250, 253-54, 107 N.E.2d 65, 66-67 (1952). This principle has been consistently applied by the New York courts and by federal courts interpreting New York law. *E.g.*, *Arcadian Phosphates*, 884 F.2d at 72-73 (and cases cited therein); *Stetson v. Duncan*, 707 F. Supp. 657, 665 (S.D.N.Y. 1988).

In applying this settled rule of state contract law, the Court of Appeals decision noted several undisputed facts that it found dispositive: (1) the parties had previously indicated their intent to require any modification of their existing agreement to be in a written agreement by including a clause in the 1981 Agreement that said "[t]he terms of this Agreement cannot be waived or modified except by an agreement in writing." (902 F.2d at 1080; Pet. App. 15a); (2) the mailgram did not purport to be a final agreement because it lacked the critical royalty term and, on its face, looked forward to "final papers" at a future time (902 F.2d at 1076, 1080; Pet. App. 5a, 15a); (3) the February 28 letter from JBC's lawyer also did not purport to be a final agreement, but instead looked toward a future agreement and proposed additional terms for discussion (902 F.2d at 1077, 1080; Pet. App. 7a, 15a); and (4) the parties continued, for nine months after the February correspondence, to engage in vigorous negotiations that would be inexplicable if the parties had already reached a final agreement (902 F.2d at 1077-79, 1080; Pet. App. at 8a-14a, 15a).

Fully aware of these undisputed facts, the Court of Appeals "conclude[d] that the undisputed objective facts *demonstrate beyond cavil* that the parties did not intend to be bound until 'final papers' or an 'acceptable writing' was prepared and signed." 902 F.2d at 1081; Pet. App. 17a (emphasis added). The parties negotiated for nine months without agreeing to such final papers.

JBC complains, however, that the Court of Appeals placed too much emphasis on two written documents—the February

22 mailgram and the February 28 letter. Pet. 23. That argument is frivolous because, under the terms of both the 1981 Agreement and section 15-301(1) of New York's General Obligations Law, there could be no binding modification without a writing that contained the material terms of the agreement. *See* Part II, *infra*. Yet, the District Court could not point to a writing that constituted the allegedly binding agreement and JBC has vacillated on what document it believes constituted the agreement.

In its findings of fact, the District Court said the mailgram constituted the parties' understanding, but the Court never mentioned the absence of the royalty term. Pet. App. 48a-49a. In its conclusions of law, the District Court said the only possible question as to the adequacy of the mailgram under New York law was whether it "expressly or by implication" contained all the material terms of an agreement (Pet. App. 81a); but having posed the issue, never explained how the unstated royalty increase was not a material term or how it could be "implied" as part of the mailgram agreement (*see* Pet. App. 81a-82a). JBC acknowledges this failure of the trial court, but incredibly suggests that a finding that would bind the Court of Appeals under Rule 52(a) can "fairly be implied" from the District Court's opinion. Pet. 32. The Court of Appeals was entirely correct in concluding that on the critical question of whether the mailgram constituted the agreement of the parties, the District Court's opinion was "somewhat obscure." 902 F.2d at 1076; Pet. App. 5a.

JBC argues in its petition that the mailgram constituted the alleged agreement. Pet. 13-15, 23-24. In the Court of Appeals JBC abandoned a similar argument and instead claimed that an amalgam of the February 22 mailgram and the February 28 letter constituted the agreement. *See* 902 F.2d at 1080; Pet. App. 15a; *compare* 902 F.2d at 1076; Pet. App. 5a.

The Court of Appeals correctly found both the District Court's mailgram and JBC's amalgam theories to be clearly wrong. First, the February 22 mailgram failed to mention the increase in royalty—an omission the Court of Appeals

emphasized. 902 F.2d at 1076, 1077, 1080; Pet. App. 5a, 7a-8a, 15a. Second, the February 28 letter (1) explicitly acknowledged that the mailgram contained only part of the terms of an agreement; (2) stated that the advertising approval was for the year 1984 only; and (3) proposed additional terms and conditions that were to be part of any final agreement. 902 F.2d at 1077; Pet. App. 7a-8a.

Finally, JBC also argues that the Court of Appeals failed to give adequate consideration to the District Court's conclusion that the parties' intent to be bound in February 1984 was evidenced by their partial performance. Pet. 28-29. However, under New York law partial performance is only one of several factors to be weighed in determining whether the parties intended to enter into a contract.[7] Even with respect to partial performance, New York courts require that any performance be "unequivocally referable" to the alleged agreement. *Cinema North Corp. v. Plaza at Latham Assoc.*, 867 F.2d 135, 141 (2d Cir. 1989); *Reisler v. 60 Gramercy Park North Corp.*, 88 A.D.2d 312, 316-17, 453 N.Y.S.2d 186, 189-90 (1st Dep't 1982). The Court of Appeals properly applied this law, holding that the 5% royalty payments and the running of the disputed commercial cited by the District Court were not "unequivocally referable" to the alleged agreement. Rather, the alleged partial performance was equally—if not more so—referable to an arrangement to allow the use of the commercial in 1984 in return for a 5% increased royalty

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7 The Court of Appeals for the Second Circuit has summarized the factors identified by courts applying New York law in the context of contract formation disputes as (1) whether one or both of the parties expressed an intent not to be bound prior to the signing of a formal contract; (2) whether important contractual provisions remained unsettled and still to be negotiated; (3) whether the claimed agreement concerned substantial business matters and large sums of money, such that it would normally be found only in writing; and (4) the nature of any partial performance. *R.G. Group*, 751 F.2d at 74-77 (collecting cases). *See also Arcadian Phosphates*, 884 F.2d at 72; *Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80 (2d Cir. 1985).

while the parties continued to try to work out a binding final agreement. 902 F.2d at 1081-82; Pet. App. 18a.[8]

II. The Court of Appeals' Decision Was Also Required Under New York's General Obligations Law

The Court of Appeals also held that under the strict requirements of section 15-301(1) of New York's General Obligations Law, the mailgram—either alone or in combination with the February 28 letter—did not meet the strict statutory requirement of an "agreement . . . in writing . . . ."[9] 902 F.2d at 1080; Pet. App. 15a-16a. The Court of Appeals concluded as a matter of law that the District Court erred in finding that section 15-301(1) had been satisfied.

New York courts have made clear that section 15-301(1) is more than a simple statute of frauds. Rather, section 15-301(1) requires that a writing possess a "level of dignity and authenticity" not required under the general statute of frauds. *DFI Communications, Inc. v. Greenberg*, 41 N.Y.2d 602, 606-07, 363 N.E.2d 312, 315, 394 N.Y.S.2d 586, 589-90 (1977). Thus, an incomplete expression of an agreement embodied in a note or memorandum or in an amalgam of writings that would satisfy the general statute of frauds is not sufficient under section 15-301(1). *See Bakhshandeh v. American Cyanamid*, 8 A.D.2d 35, 37, 185 N.Y.S.2d 635, 637 (1st Dep't 1959) (decided under predecessor statute), *aff'd*, 8

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8 JBC also argues that the Court of Appeals failed to give adequate consideration to the evidence of the parties' "course-of-dealing". Pet. 21. This is simply not the case. The parties had an unbroken history of executing formal, written agreements to govern their business relations, as the Court of Appeals expressly noted. 902 F.2d at 1075; Pet. App. 3a.

9 The statute provides: "A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, *cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought* or by his agent." N.Y. Gen. Oblig. L. § 15-301(1) (McKinney's 1978 & Suppl. 1990) (emphasis added).

N.Y.2d 981, 169 N.E.2d 188, 204 N.Y.S.2d 881 (1960). Although the District Court found that the mailgram satisfied the requirement in section 15-301(1) of an "agreement . . . in writing," Pet. App. 81a; *see also* Pet. 32, it failed to acknowledge that the mailgram did not even contain the critical royalty term and lacked any semblance of the "dignity and authenticity" required of any enforceable "agreement" under section 15-301(1).[10]

The Court of Appeals expressly noted the insufficiency of the mailgram, the February 28 letter or a combination of the two under section 15-301(1). 902 F.2d at 1080; Pet. App. 15a.[11] That conclusion, required by New York law, was an independent basis for the Court of Appeals' reversal of the District Court's judgment and itself justifies denial of JBC's petition. *See Wolf v. Weinstein*, 372 U.S. 633, 636 (1963).

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10 *See Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338, 345, 366 N.E.2d 1279, 1283-84, 397 N.Y.S.2d 922, 927 (1977); *Lieberthal v. Sinclair Ref. Co.*, 130 N.Y.S.2d 454, 457 (Sup. Ct. Nassau Co. 1954) (decided under predecessor statute), *aff'd*, 286 A.D. 859, 143 N.Y.S.2d 644 (2d Dep't), *reh'g and appeal denied*, 286 A.D. 969, 146 N.Y.S.2d 476 (2d Dep't 1955).

11 JBC argues in its petition that the question of whether the mailgram "measures up to the level of dignity and authenticity" required by the statute is one of fact. Pet. 34-35. JBC's only support for that assertion is a citation to a tax case, decided under federal law, which required a determination of whether a transfer constituted a gift. *Comm'r v. Duberstein*, 363 U.S. 278, 283-84 (1960). Determinations under section 15-301(1), however, can be resolved as questions of law under New York law. *Bakhshandeh*, 8 A.D.2d at 38, 185 N.Y.S.2d at 638 (insufficiency of documents alleged to satisfy the writing requirements of the predecessor statute to section 15-301 could be determined as a matter of law). *See also Scheck*, 26 N.Y.2d at 472, 260 N.E.2d at 495, 311 N.Y.S.2d at 845 (stating in the context of New York's less stringent statute of frauds that "[w]here the writings are plainly insufficient on their face, the conclusion follows as a matter of law, that they do not satisfy the statute of frauds").

III. The Exercise of this Court's Supervisory Power over the Court of Appeals Is Not Warranted in this Case for any Other Reason

In an effort to lend credence to its petition, JBC attempts to invoke concerns about how the conduct of business will supposedly be altered if the Court of Appeals' decision is allowed to stand. JBC argues that appeals by dissatisfied litigants will proliferate (Pet. 42-43) and uncertainty will infect the business world (Pet. 44-47) if the Court of Appeals is not reversed. The arguments are simply wrong.

First, this case involves nothing more than an application of the well-settled clearly erroneous standard. There is no risk that litigants who review the Court of Appeals' opinion will be heartened in their quest to obtain *de novo* review of their cases.

Second, the Court of Appeals' decision follows well-established New York law concerning contract formation. That underlying law forms the substantive standard which guides the conduct of business. A primary concern of New York contract law has been to " 'avoid trapping parties in surprise contractual obligations that they never intended.' " *Arcadian Phosphates*, 884 F.2d at 72 (quoting *Teachers Ins. & Annuity Ass'n of America v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987)). This view derives from New York's determination that "[i]t is important to commerce that the law make clear what force will be given to various expressions of intent, for otherwise parties could never be assured that they were, in fact, channeling their negotiations toward an oral contract or toward a written one." *R.G. Group*, 751 F.2d at 74-75.

New York has developed a law of contract formation that attempts to create certainty by allowing the parties to avoid precipitously entering into an agreement they do not yet intend to finalize. As in the present case, parties may accomplish this by reserving to themselves the right to form their contract only when a final agreement is formally signed. This is a basic principle of New York contract law, consistently

applied by New York state courts[12] and appropriately followed by numerous unanimous panels of the Court of Appeals for the Second Circuit.[13] The decision below faithfully applied this settled principle of state law.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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12 *See, e.g., Scheck*, 26 N.Y.2d at 469-70, 260 N.E.2d at 494, 311 N.Y.S.2d at 843; *EDP Medical Computer Systems*, 149 A.D.2d at 564-65, 540 N.Y.S.2d at 19-20; *Tebbutt v. Niagara Mohawk Power Corp.*, 124 A.D.2d 266, 268, 508 N.Y.S.2d 69, 70-71 (3d Dep't 1986); *Brause v. Goldman*, 10 A.D.2d 328, 332, 199 N.Y.S.2d 606, 611 (1st Dep't 1960), *aff'd without opinion*, 9 N.Y.2d 620, 172 N.E.2d 78, 210 N.Y.S.2d 225 (1961); *Rosenzweig v. Salkind*, 5 A.D.2d 58, 60, 169 N.Y.S.2d 213, 215-16 (1st Dep't 1957), *aff'd without opinion*, 5 N.Y.2d 902, 156 N.E.2d 712, 183 N.Y.S.2d 82 (1959); *Gambee v. Argendorf*, 10 Misc. 2d 598, 602, 172 N.Y.S.2d 370, 374-75 (Sup. Ct. Erie Co. 1958).

13 *Arcadian Phosphates, Inc.*, 884 F.2d at 72-73; *Best Brands*, 842 F.2d at 589-90; *Winston*, 777 F.2d at 80-84; *R.G. Group*, 751 F.2d at 74-77; *Reprosystem*, 727 F.2d at 261-63.